

1 STATE OF WISCONSIN

CIRCUIT COURT
Branch 05

MILWAUKEE COUNTY

2
3 STATE OF WISCONSIN,

4 Plaintiff,

5
6 -vs-

File No. 04-CF-000609

7 DANNY L. WILBER,

8 Defendant.

9
10 JURY TRIAL (DAY 4 - P.M.)
11
12

13 Proceeding held on February 17, 2005

14
15 BEFORE THE HONORABLE MARY KUHNMUENCH
16 CIRCUIT COURT JUDGE

17
18 A P P E A R A N C E S

19 JAMES GRIFFIN, Assistant District Attorney,
20 appeared on behalf of the State of Wisconsin.

21 MICHAEL CHERNIN, Attorney at Law, appeared
22 on behalf of the defendant.

23 The defendant appeared in person.
24
25

Cynthia A. Dobbs
Certified Shorthand Reporter

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E X H I B I T I N D E X

(No exhibits received.)

1 (The following proceedings were held
2 outside the presence of the jury.)

3 THE COURT: All right. Let's go on the
4 record. The State of Wisconsin versus Darryl -- I mean --
5 Danny Wilber, 04-CF-000609, first degree intentional
6 homicide while armed with a dangerous weapon.

7 MR. GRIFFIN: Assistant D.A. Jim Griffin
8 for the State with Detective Tom Casper of the Milwaukee
9 Police Department.

10 MR. CHERNIN: Michael Chernin appearing on
11 behalf of Danny Wilber. Danny Wilber is down the hall
12 coming in a custodial --

13 MR. GRIFFIN: Setting.

14 MR. CHERNIN: -- setting. Thank you. My
15 client is now present in the courtroom.

16 THE COURT: All right. The State of
17 Wisconsin versus Danny Wilber. The Court has previously
18 called the case for the afternoon session, the lawyers
19 have made their appearances on the record, and the
20 defendant is now present in court.

21 The issue of the demonstrative evidence
22 that the State has wished to introduce into the record has
23 come up on at least three occasions and the Court has --
24 during the course of this trial the Court has talked to
25 the lawyers about what I believe are the relevant cases,

1 what the Fifth Amendment privilege allows or does not
2 allow with respect to demonstrative evidence, and that
3 there is a relevant Court of Appeals case on point, as
4 well as the Supreme -- the Supreme Court of the United
5 States case in Pennsylvania v. Muniz, M-U-N-I-Z, 496 U.S.
6 582, 1990 wherein the Supreme Court of the United States
7 indicated that the -- or held that the privilege does not
8 protect a suspect from compulsion to produce real or
9 physical evidence.

10 With that as a backdrop, there is also a
11 State of Wisconsin case, that's State v. Hubanks,
12 H-U-B-A-N-K-S, which was a case actually out of Milwaukee
13 County before then Circuit Court Judge Rudolph Randa, I
14 believe the prosecutor was then John DiMotto, it's 173
15 Wisconsin 2d at Page 1. That case specifically referenced
16 a voice identification issue and the court's allowance of
17 the state's request in front of the jury of having the
18 defendant submit a voice identification in front of the
19 jury, even though he had made the determination not to
20 testify during the trial to exercise his Fifth Amendment
21 rights. The Court ultimately ruled that it was
22 demonstrative evidence and it was admissible and
23 ultimately indicated that he would give an instruction to
24 the jury should the defendant refuse to comply with such a
25 directive, and in that case since the defendant in fact

1 refused to give the direct -- to produce that type of
2 evidence -- demonstrative evidence consistent with what
3 the State was asking for, Judge Randa apparently gave an
4 instruction to the jury that they were able to give -- the
5 jury could give that declination the weight they think
6 that it deserves. The defendant in that case,
7 Mr. Hubanks, appealed both issues, that is, that it was a
8 violation -- the demonstration itself was in violation of
9 his Fifth Amendment rights and then secondly that the
10 instruction that the court ultimately gave to the jury was
11 improper. The Court of Appeals affirmed the trial court
12 on both points.

13 With that as the backdrop, Mr. Chernin -- I
14 mean -- Mr. Griffin, I'm going to have you since it's your
15 request, your motion *in limine* to ask the Court permission
16 at this time for the introduction of demonstrative
17 evidence involving the defendant, I'm going to have you
18 put that on -- your request on the record at this time and
19 just summarize for the Court the procedure that you intend
20 to use.

21 MR. GRIFFIN: Judge, I have -- I'm going to
22 go ahead and mark this board as Exhibit 40. This board
23 was made in the arts and crafts shop of the D.A.'s Office
24 by Ms. Maggiore and company. It is essentially several
25 different pieces of foam type board put together to

1 measure -- I don't even know how tall, I would say over 7
2 feet, and obviously it's about maybe a yard wide or so,
3 and I simply am going to -- the defendant obviously is not
4 going to be allowed to move from his chair. I'm simply
5 going to ask the defendant to stand and point to this
6 board. I'm going to ask him to -- do you want me to do it
7 now so you can --

8 THE COURT: Yes.

9 MR. GRIFFIN: Is the defendant willing to
10 do it?

11 THE COURT: Well, Mr. Chernin, we've never
12 even made it to that point so I don't know what --

13 MR. CHERNIN: For purposes of this
14 demonstration and to deal with the issue of the argument,
15 I'm going to ask Mr. Wilber to do it here, and although
16 the Court has not made a ruling on it -- I'm going to ask
17 you to do it here because I want the Court to see what
18 Mr. Griffin is asking you to do in front of the jury and
19 I -- and I do have a response, but -- and please do this
20 part with them.

21 MR. GRIFFIN: Well, if I may, if he does
22 this and Detective Casper sees it, Detective Casper or
23 anyone else in the courtroom could testify about what
24 happened when he did it, so even if he does it to show
25 what it is we are going to do, I mean, I can use Detective

1 Casper as if he were the defendant, have him point, but if
2 the defendant's points here, there's -- Detective Casper
3 is going to watch him do it.

4 MR. CHERNIN: Okay. Well, if that's what
5 you are going to ask -- if that's the way you want to do
6 it, let's -- why don't you explain what you want done.

7 MR. GRIFFIN: Sure. Detective Casper --
8 I'm going to use Detective Casper, Judge, as if he were
9 the defendant just to show you what I would like him to
10 do.

11 THE COURT: Go ahead.

12 MR. GRIFFIN: I would put the board in a
13 place where the defendant could reach it with the tip of
14 his finger and I would ask him first --

15 THE COURT: I want you to -- Mr. Griffin,
16 you are standing directly in front of the jury box with
17 that board and obviously the defendant -- if Mr. Casper is
18 going to -- Detective Casper is going to be the defendant
19 for purposes of this exercise, I'm going to tell you to
20 have him step directly into the spot that you are
21 requesting this Court to have the defendant stand, so in
22 front of the jury box is not going to -- that's not going
23 to be allowed. The defendant as I indicated to both
24 parties yesterday will remain seated -- or will remain at
25 his counsel table at all times and however this exercise

1 is carried out, with or without his cooperation, it needs
2 to be conducted from that immediate area so as to protect
3 again his -- the jury from seeing any of the security
4 restraints that we've used, particularly on his ankle, in
5 front of the jury. So the detective should stand there
6 where ostensibly he is right now which is about a half a
7 foot if that, you know, a few inches away from the
8 defendant who is now seated. Detective Casper is now
9 standing next to the seated defendant at counsel table.
10 You are standing directly to the right of that counsel
11 table within about it appears to the Court to be a foot
12 and a half from -- or I would say probably 3 feet actually
13 from the defendant -- the seated defendant.

14 MR. GRIFFIN: The board would be at
15 approximately this spot. I would try to get it so it's
16 approximately at arm's length away from the defendant. I
17 don't know exactly how, but I would ask the defendant to
18 simply hold his arm out with his either palm down I guess
19 and his fingers extended or just have his right finger
20 touch the board so that his arm essentially is straight at
21 shoulder level.

22 THE COURT: How are you going to ask him to
23 do that?

24 MR. GRIFFIN: I would -- I would simply --
25 well, actually I think the Court ought to ask him to do

1 it, not me, but --

2 THE COURT: No, this is your request.

3 MR. GRIFFIN: I would say, Mr. Wilber,
4 would you please point directly at the board with your arm
5 at shoulder length -- at shoulder height, excuse me, level
6 with your shoulder, he would point to a particular spot on
7 the board with either -- which either I or Detective
8 Casper would then mark, I would then ask him to point to
9 the line that I have placed here, there's a black line on
10 the board, I would ask him to then touch that line.

11 THE COURT: And for what purpose are you
12 asking or seeking to have the introduction of this
13 demonstrative evidence into the record?

14 MR. GRIFFIN: The -- as I've said before,
15 Judge, and I think there's evidence on the record that the
16 defendant is as tall as 6'9", on his booking photos I
17 think it's 6'7", I think Mr. Jennings may have said 6'8",
18 and I believe that when the defendant points to this line
19 here which is at 5'8", his arm would be in a slightly
20 downward angle which would not happen for someone say who
21 is 6 feet such as myself; even to get to 5'8", my arm is
22 coming up and I'm just about 6 feet and I have shoes on.

23 There was testimony from Dr. Jentzen that
24 the victim's injury was actually an inch and a half below
25 the top of his head, 5'6 and a half if you will, but as we

1 know from the photos, the defendant (sic) had some sort of
2 shoes or boots on. So sort of not knowing exactly how
3 high those shoes --

4 THE COURT: The defendant or the victim?

5 MR. GRIFFIN: Strike that, the victim.
6 They look like sort of average rubber soled boots. So
7 again I put the line at 5'8", and this is not a specific
8 demonstration, but I think it's an approximation where it
9 would have been if the defendant -- where the entrance
10 gunshot wound would have been given the fact that Mr. Diaz
11 had some kind of shoe on. And the Court can review the
12 photos to see if an inch and a half is some -- I mean, he
13 didn't have platform heels on or anything like that. So
14 that's the purpose of my demonstration. I believe that
15 ultimately Mr. Wilber will have to drop his arm, in other
16 words, that his arm --

17 THE COURT: What does it go to?

18 MR. GRIFFIN: It goes to the angle of the
19 wound, in other words, the trajectory of the bullet
20 through Mr. Diaz's head is at a downward angle and we are
21 talking about an entrance gunshot wound that assuming
22 Mr. Diaz had no shoes on was 5 feet 6 and a half inches
23 approximately from the ground. The bullet traveled
24 through his head and came out approximately 4 inches lower
25 than that. Again in the anatomic position.

1 THE COURT: And again the purpose of having
2 the defendant go through this exercise in front of the
3 jury is for what?

4 MR. GRIFFIN: Is to show that the defendant
5 at his height unlike someone who was 5'8" for example
6 would -- again as he put the gun out towards Mr. Diaz's
7 head and he aimed it at his head would have a slightly
8 downward angle to his arm, as I said before, contrasted
9 with someone who isn't that tall.

10 THE COURT: And you believe that this is
11 consistent with other types of demonstrative evidence how?

12 MR. GRIFFIN: Well, I didn't -- I believe
13 that the defendant's arm out similar to a voice pattern or
14 the other things talked about in the case law is nothing
15 that's normally hidden from view, it's not testimonial in
16 any way. The defendant holding his arm out or holding his
17 arm out a few inches lower is something that the
18 defendant's probably done a countless number of times in
19 his life that a countless number of individuals would have
20 seen. Certainly there's even been testimony from his
21 family members that night that he held his arms up, that
22 kind of a gesture if you will. There's nothing
23 communicative about it in the sense of testimony, it's not
24 the -- it's no different than him speaking words or
25 pointing or walking with a particular gait, that's his

1 normal gate that people would have always seen him walk
2 with, and so for those purposes and I think that for those
3 reasons it's not testimonial, it's not the kind of
4 testimony that the Fifth Amendment protects against, and I
5 gave some of the cites that I thought were consistent with
6 that principle earlier. It's no different than a
7 fingerprint, a voice print, a particular gesture, walking.

8 THE COURT: In the Hubanks case for
9 instance the defendant argued that the particular words
10 that he was asked or directed to speak were inherently
11 testimonial because they were non neutral, content laden,
12 and prejudicial and thus was a clear -- they went to his
13 mindset or depicted that and thus was a violation of his
14 Fifth Amendment right. How would you respond to that?

15 MR. GRIFFIN: Well, I think the -- in a
16 subjective sense I guess if you want to assume for a
17 minute that the defendant is guilty and did say those
18 things guiltily, he is repeating the same words that he,
19 himself, said at the time of the crime, but that's
20 obviously the whole question, I mean, you are sort of
21 bootstrapping the answer in a sense that if the defendant
22 is guilty and if he pointed the gun at Mr. Diaz, clearly
23 his arm would have been at a downward angle and in a sense
24 what the jury is seeing is some similar type of
25 reenactment to the actual crime, but that's not the

1 question here, in other words, the fact that the guy had
2 to utter specific words in Hubanks for example, the words
3 which were alleged that he said the night of the crime, is
4 no different because he's not guilty, and there's nothing
5 being said to the jury, hey, he's going to repeat the same
6 words he said that night, everybody, get ready. No,
7 that's sort of the -- the allegation if you will from the
8 State, that's the State's theory, but the defendant if you
9 will, there's nothing in the defendant uttering those
10 words that is an admission in and of itself that he did in
11 fact utter those words. There's nothing with the
12 defendant pointing at this board here today that in any
13 way says or indicates -- in other words, the defendant is
14 not in any way indicating to the jury that he in fact did
15 that, that he in fact pointed his arm at Mr. Diaz's head
16 and fired, this is nothing that the defendant is saying to
17 the jury himself, he's not being compelled to say I am
18 guilty in any way or to incriminate himself. He is being
19 forced to do what he would do every single day anyways --
20 you figure fingerprints, walking -- I don't remember the
21 exact quotes, but I can get them if the Court will give me
22 a second.

23 MR. CHERNIN: Exact quotes from what,

24 Hubanks?

25 MR. GRIFFIN: No. What I think is sort of

1 the relevant Fifth Amendment testimony -- issues here.
2 That the privilege against self-incrimination is a bar
3 against compelling, quote, communications or testimony,
4 but that compulsion which makes a suspect or accused the
5 source of real or physical evidence does not violate it.
6 And this is just real or physical evidence, the angle of
7 his arm if you will at the time of the shooting.

8 In terms of some of the voice kinds of
9 comparisons, I think the case law said the like -- like
10 facial characteristics, as voices repeatedly proves for
11 others to hear and things like that and that's why it's
12 not any kind of mystery, and that the Fourth -- strike
13 that -- the -- where's the quote that I was -- well, I
14 thought I had it here, Judge, but maybe I'm wrong. I
15 don't know what I did with that stuff.

16 So that again is no different than if the
17 defendant walked for the jury, stood up for the jury, held
18 his hands out for the jury, showed a tattoo or a mole to
19 the jury, showed that he was missing a finger or a toe to
20 the jury, to show that the particular identifications for
21 example by a witness are in fact accurate. The defendant
22 is not testifying in this particular instance. He's not
23 saying to the jury that it's true or not true or anything
24 like that. The jury is allowed to observe physical
25 characteristics and movements, and in this particular

1 case, arm angles of the defendant which are not
2 testimonial in any way.

3 THE COURT: Anything else?

4 MR. GRIFFIN: Nope.

5 THE COURT: Mr. Chernin.

6 MR. CHERNIN: Okay. Here's the big
7 distinction between what Mr. Griffin is talking about and
8 those cases are talking about. In Hubanks in particular
9 there had been testimony that the perpetrator of the crime
10 uttered specific words and based upon the testimony of
11 that witness it was asked that those words be repeated so
12 that an *in court* identification could be made of -- of the
13 person who perpetrated the crime. Ostensively if the
14 person on the stand heard the words and -- and -- and the
15 speaker had, you know, a Slovak accent, it wasn't going to
16 be that person, I mean, that was the notion of what was
17 going on when Judge DiMotto asked -- then A.D.A. DiMotto
18 asked Judge Randa for that ruling. So there is a
19 difference here in that there is no testimony in the
20 record and there will be -- unless -- unless some of these
21 witnesses change their version of events, there will be no
22 testimony in the record indicating that someone saw or
23 observed Danny Wilber holding a gun in a particular angle
24 and now having that witness be able to identify Wilber
25 from that conduct. The sole purpose -- oh, and let me

1 back up. That really is the distinction, okay, that --
2 and the other thing is there's no -- I don't know which
3 hand Mr. Griffin intends to have Mr. Wilber raise to
4 engage in this because there's no testimony in this record
5 showing that Mr. Wilber held a gun in his left or right
6 hand and there's nobody saying that he's right handed or
7 left handed, so we now have some further testimonial
8 issues coming into play where if Mr. Wilber were to -- I
9 mean, I don't know which hand he would raise and I don't
10 know which hand they are asserting that he had a gun in,
11 but that would be testimonial in nature and would -- if --
12 for example if he were to raise his right hand because
13 that would be in a position that would allow him to shoot
14 across at a particular angle, that is testimonial in
15 nature, but he also could be left handed, I don't know,
16 and that's why this is testimonial in nature and it's
17 asking the defendant to reveal something that would not
18 otherwise be revealed.

19 MR. GRIFFIN: Well, he's now changing the
20 entire argument, the entire offer. This is not used nor
21 could it ever be argued that he because he pointed to this
22 board, auh-hah, he had a particular angle, that's not the
23 point that we are talking about here.

24 MR. CHERNIN: Well, that's exactly it.

25 MR. GRIFFIN: No, it isn't.

1 MR. CHERNIN: Yes, it is. You are saying
2 that you want him to demonstrate that he's going to --
3 that the gun from his arm would be pointed at a particular
4 angle. You have no measurements to confirm what those --
5 what those angles are and you are asking him to create
6 evidence for you in the courtroom. Now if it were -- if
7 it were a question as I said earlier of identification
8 based upon a witness' perception of events that you are
9 trying to demonstrate, that's one thing, but all you are
10 doing is trying to inflame this jury by having Wilber
11 appear in -- Mr. Wilber appear in a menacing fashion, and
12 aside from the fact that it's testimonial, the next -- and
13 if the Court says it's not testimonial, then the question
14 is, is it prejudicial, and that's what Footnote 7 of the
15 Hubanks case addresses, is it prejudicial in nature, and
16 the only thing that you hope to do is to have a jury see
17 Mr. Wilber engaged in a particular form of conduct.
18 Anybody who is -- has any ability to think at all could
19 see that preliminary a person 6'7" could point down, but
20 that doesn't mean that a person standing on the steps
21 couldn't have reached over and done that. No one has
22 testified as to that. That would be like having me ask
23 for a demonstration of having somebody stand on the steps
24 and do it and -- and it could have been a shorter person
25 with their arm out trying to reach over something. We

1 don't know what the situation is. There is no testimonial
2 evidence.

3 THE COURT: You are arguing about all
4 those -- the most recent comments you've made,
5 Mr. Chernin, go to the weight the jury would give it, not
6 it's admissibility, I mean, your argument on the
7 testimonial nature goes to admissibility.

8 MR. CHERNIN: Correct.

9 THE COURT: Everything else you are talking
10 about goes to the weight the jury would give it, what
11 evidentiary value does it have, how is it relevant, and I
12 would like the State to respond to it.

13 Demonstrative evidence has value because it
14 ostensibly assists the jury, the trier of fact, it
15 clarifies evidence, clarifies a particular point or an
16 element that has been raised or an issue that's been
17 raised during the trial. So I guess the question that I
18 have for the State at this point is just in response to
19 the first part. I will deal with the prejudicial issue
20 later.

21 MR. CHERNIN: Yes.

22 THE COURT: How is this -- you know, it's
23 clearly demonstrative evidence. If it's not testimonial
24 in nature, it's admissible. The arguments he is raising
25 go to its weight and unfair prejudice, but, you know, why

1 is this demonstration relevant demonstrative evidence and
2 how will it assist the jury?

3 MR. GRIFFIN: Judge --

4 MR. CHERNIN: If I might --

5 THE COURT: One moment. You raised a point
6 and I want him to respond.

7 MR. GRIFFIN: Judge, if I may before I
8 answer, I got a note from Ms. Maggiore that Oscar Niles is
9 talking about leaving and that he doesn't care whether you
10 body attach him or not, he's been here for three days,
11 etc., and I will be able to get through the rest of the
12 afternoon without doing this demonstrative evidence. I
13 also have another witness, Lea Franceschetti, who gave
14 birth on Sunday and is in a lot of pain. So I'm going to
15 ask the Court's indulgence, can we go ahead and finish
16 these witnesses and then deal with this at the end of the
17 day?

18 THE COURT: Are you going to need a body
19 attachment?

20 MR. GRIFFIN: If he sticks around this
21 afternoon, no. If I don't get to him this afternoon, I
22 may.

23 THE COURT: Who are you putting on the
24 witness stand next?

25 MR. GRIFFIN: Lea Franceschetti and Jaimie

1 Williams. Lea's in a lot of pain.

2 THE COURT: What are you going to do with
3 Oscar Niles?

4 MR. GRIFFIN: Right after. They won't take
5 that long. They will take maybe a half an hour each.

6 MR. CHERNIN: Here's the problem,
7 Mr. Griffin, I know you are trying to put something on,
8 you asked him to be here, you told him you were going to
9 put him on this morning, based upon that he made
10 arrangements to -- he's got to take care of his daughter.

11 THE COURT: Mr. Chernin, you are not his
12 advocate.

13 MR. CHERNIN: No, I'm just.

14 THE COURT: Mr. Chernin, you are not
15 Mr. Niles' advocate in this court, you are Mr. Wilber's.

16 MR. CHERNIN: I have --

17 THE COURT: And you keep stepping over the
18 line, including getting too comfortable with the jury box.
19 Now step away from the jury box now.

20 MR. CHERNIN: There's no jury in the
21 courtroom.

22 THE COURT: I don't care if they are in
23 there or not, it's a habit that you are developing and
24 continuing even outside the presence of the jury and you
25 are taking liberties that I'm not going to allow or

1 continue to permit. I said to you earlier that if you did
2 these things -- you also interrupted counsel in the middle
3 of his testimony where you were going to start asking, and
4 just because you think it is an inane point that you can
5 just blab out what the word is, you mean Vato, that's not
6 your role. When you want clarification or want to get
7 clarification, you do it on cross. Now I've given you a
8 lot of leeway on both of those areas. If I have to do it
9 again, I'm going to instruct you in front of the jury.
10 Please don't make me do that.

11 Now with respect to the issue of the body
12 attachment. It seems to me that out of fairness to Mr.
13 Wild -- or Niles -- Oscar Niles, is that his name?

14 MR. GRIFFIN: Yes.

15 THE COURT: That you are -- and if you are
16 worried about whether he is going to leave or not, he
17 ought to be the witness that you put on the witness stand
18 first this afternoon or to alleviate any additional
19 concerns that the Court would have with him leaving and
20 you coming to me at the end of the day today asking for a
21 body attachment ask for it now so that the deputies can
22 secure him or law enforcement can secure him, one or the
23 other, but I don't want to have to deal with this issue at
24 6 o'clock.

25 MR. GRIFFIN: Understood. I will call

1 Mr. Niles right now if the Court is willing to go ahead
2 and let's -- we can deal with him.

3 THE COURT: I'll put the legal issue on the
4 back burner. We will deal with it at the end of the day.

5 MR. GRIFFIN: Thank you.

6 THE COURT: Let's bring the jury out.

7 (The following proceedings were held in the
8 presence of the jury.)

9 THE COURT: Mr. Niles, I'm going to have
10 you raise your right hand. My clerk will swear you in.

11 OSCAR NILES, being first duly sworn on oath
12 to tell the truth, the whole truth, and nothing but the
13 truth, testified as follows:

14 THE COURT: What I'm going to ask you to
15 do, Mr. Niles, is pull your chair directly into that bench
16 in front of you. Use the mike. Speak up loud and clear
17 so that we can get all of your responses on the record.
18 I'm going to have you begin by stating your full name for
19 the record, spelling your first and last name. Go ahead.

20 THE WITNESS: Oscar Niles, O-S-C-A-R
21 N-I-L-E-S.

22 THE COURT: You may begin.

23 MR. GRIFFIN: Could we see you on the side
24 for a second, Judge, before we start.

25 (Whereupon, an off the record discussion

1 was had.)

2 THE COURT: Mr. Niles, the lawyers are
3 going to approach you with some material to refresh your
4 memory on something.

5 (Whereupon, an off the record discussion
6 was had.)

7 THE COURT: Back on the record. You may
8 continue.

9 DIRECT EXAMINATION BY MR. GRIFFIN:

10 Q Sir, how old are you?

11 A Twenty one years old.

12 Q And what do you do for a living?

13 A Work at Coakley Brothers.

14 Q Is that a mover?

15 A Yes, it is.

16 Q And what part of town do you live in, what street, the
17 closest big intersection, that kind of thing?

18 A 27th Street.

19 Q And -- 27th and what?

20 A Lincoln.

21 Q Do you know Danny Wilber?

22 A Yes, I do.

23 Q Do you know him as Slim?

24 A Yes.

25 Q Do you see him in court today?

1 A Yes, I do.

2 Q Can you point him out by where he's sitting and what he's
3 wearing.

4 A He's wearing a light blue shirt and he is sitting to the
5 front of you.

6 Q Does the shirt he have on have any stripes on it?

7 A Yes, it does.

8 MR. GRIFFIN: May the record reflect the
9 witness has identified the defendant?

10 THE COURT: It does.

11 Q How do you know Mr. Wilber?

12 A I know him through friends and that's a family member of
13 some of my friends.

14 Q How long have you known him? In other words, have you
15 known him at all -- what -- how long you've been good
16 friends or bad friends, how long have you known Danny
17 Wilber? Since you were 2?

18 A No, maybe about a year.

19 Q A year from now or a year back from when the shooting
20 happened?

21 A I would say probably like a year since the shooting
22 happened.

23 Q So in other words, when the shooting happened, at that
24 time you'd known him for about a year?

25 A Yes. I knew him a few months prior before that.

1 Q Okay. And you had met him through family members of yours
2 as well as friends of yours?
3 A No, friends of mine are family members of his.
4 Q Like who?
5 A Donald Jennings, Antonia West.
6 Q How long have you known Donald?
7 A I know Donald for about 3 years.
8 Q And Antonia?
9 A Roughly around the same time.
10 Q But you didn't meet Danny Wilber until a couple months
11 before the shooting?
12 A Correct.
13 Q What about Wanda Tatum?
14 A I knew her around the same period as the other ones.
15 Q 3 years?
16 A Yeah.
17 Q Where did Wanda live? Where did the Wilber family --
18 where was their primary residence for the Wilbers, and the
19 Tatums, and the Wests?
20 A 26th and Forest Home.
21 Q 2548?
22 A I'm not sure what the address is correctly, but 26th and
23 Forest Home.
24 Q Okay. How many times in your life would you say you've
25 been there? Too many to count?

1 A Too many to count. Over five.

2 Q Over five times?

3 A Yes.

4 Q And was -- was your first sort of connection into the --

5 Mr. Wilber and his family through Donald Jennings?

6 A Can you repeat that.

7 Q Sure. Was the first person of the -- Danny Wilber's

8 family, including his cousins, and his sisters, and all

9 that stuff -- was the first person of that group that you

10 ever knew or were friends with, was it Donald Jennings?

11 A Yes.

12 Q And how did you and Mr. Jennings meet? School or just the

13 street?

14 A The playground. We used to play basketball together.

15 Q The night of the shooting, in other words, the evening

16 before that, did you go to Bicardi's?

17 A Yes, I did.

18 Q What is Bicardi's?

19 A A local tavern.

20 Q How many times before the night of the shooting would you

21 say -- when you were there how many times in your life

22 before that had you been there?

23 A A few.

24 Q Was it a regular hangout?

25 A I wouldn't say a regular hangout, but I've been there many

1 times.

2 Q On that particular night why was it that you ended up at
3 Bicardi's?

4 A I couldn't tell you that one.

5 Q Were you planning on meeting someone? Did you have a
6 date? Is that just a place that you go sometimes?

7 A Just a place where I go to have a few drinks.

8 Q Did you have a few drinks?

9 A Yes, I did.

10 Q And for you when you say a few drinks, what is it you are
11 drinking? What were you drinking?

12 A Mixed drink. Mixed drinks.

13 Q Which ones?

14 A Hennessey and Coke.

15 Q Anything else?

16 A No, that's it.

17 Q So your sort of preferred drink is Hennessey and Coke?

18 A Yes.

19 Q And for those who may not know on the jury, what is
20 Hennessey?

21 A A cognac.

22 Q Before you left Bicardi's that night and went to the
23 after -- you went to that after-set. Correct?

24 A Right.

25 Q The after-hours party?

1 A Correct.

2 Q The time you were at Bicardi's, how many drinks
3 approximately would you say you had?

4 A Probably three -- two or three.

5 Q How long were you there?

6 A I can't recall that.

7 Q What would be a more normal time? Would you go there
8 right after dinner like 7 o'clock?

9 A No.

10 Q Later like 10, 11'ish?

11 A 10, 11'ish.

12 Q I know you weren't looking at your watch, but would it be
13 later in the evening or night time?

14 A Night time.

15 Q And how long did you stay, until they closed?

16 A Until they closed.

17 Q What time did they close that Saturday morning?

18 A I can't tell you the exact time, but I think they start
19 shutting down around 2.

20 Q So some time after 2 would have been the time you moved
21 from Bicardi's to the after-set?

22 A Correct.

23 Q How did you find out about that party -- the after bar
24 party?

25 A I just heard it throughout. No one personally told me,

1 it's just everyone was given the word.

2 Q Well, didn't they get on the microphone and say party at
3 1128 West Mineral, everyone go there?

4 A Not that I recall.

5 Q But word was that if you were at Bicardi's and whatever,
6 there was this party at 1128 West Mineral. Is that right?

7 A Yes.

8 Q Did you go there?

9 A Yes, I did.

10 Q Do you remember how you got from Bicardi's to that party?

11 A Yes.

12 Q How?

13 A A friend named Endalia.

14 Q That's E-N-D-A-L-I-A?

15 A Correct.

16 Q What is her relationship to you?

17 A Just a friend.

18 Q A romantic friend or a neighborhood friend?

19 A Just a friend.

20 Q It's a woman?

21 A A woman friend, yep.

22 Q Had you gone with her to Bicardi's or you just met her --
23 saw her there?

24 A I saw her there. No plans to meet her there or anything.
25 I seen her there.

1 Q And sort of she said she was going to the after-set, you
2 said, hey, give me a ride, you ended up going with her?
3 A No, she didn't say she was going, I just kind of invited
4 her.
5 Q Did anyone else go in the car with you two?
6 A No, they didn't.
7 Q Did you guys go get something to eat or anything like that
8 before the after-set or you went straight from Bicardi's
9 there?
10 A Straight from Bicardi's there.
11 Q How far of a ride was that approximately?
12 A 5 minute ride.
13 Q And did you guys pretty much get there, park, and go in?
14 A Yes.
15 Q And what happened when you were in there? What was going
16 on?
17 A People drinking, playing cards I think, lifting weights.
18 Q What were you doing?
19 A What was I doing? I was sitting in the kitchen talking to
20 a few people.
21 Q Were you playing cards or lifting weights?
22 A Neither one of those.
23 Q Drinking?
24 A I think I had a beer.
25 Q Did you have time before the stuff started getting

1 crazy -- I mean, did you have time to finish that beer or
2 not even?

3 A Not even to be honest.

4 Q Where were you in the house? When you first got there,
5 did you go straight to the kitchen and stay there, the
6 weight room, the front room, upstairs, what?

7 A Straight to the kitchen.

8 Q And did you -- do you recall from the time you first got
9 to that kitchen to the time the shooting happened, do you
10 recall leaving that kitchen?

11 A I don't think I left the kitchen.

12 Q How long would you say you were in that party there on
13 Mineral before things started getting out of the ordinary?

14 A Not even 20 minutes maybe.

15 Q So pretty quick things started getting unusual?

16 THE COURT: Is that yes or no?

17 THE WITNESS: Yes.

18 Q Was there something going on in the weight room where guys
19 were lifting weights and dropping them on the floor or
20 something like that?

21 A I did hear that, but like I said, I was in the kitchen, I
22 don't know what was going on in the living room.

23 Q Was there any kind of argument or anything like that?

24 A Not to my knowledge.

25 Q So as you are in the kitchen there, at some point did you

1 have words or something like that with Mr. Wilber didn't
2 you say? Was that a no?

3 A We got into an argument, but what do you mean by words?

4 Q Well, didn't you say something to upset him?

5 A No.

6 Q You didn't say anything?

7 THE COURT: Is that a yes or no?

8 A Not to my knowledge, no.

9 Q The problem, sir, the reason we keep asking you to speak
10 is that moving your head -- I see you obviously going up
11 and down and back and forth, but the woman in front of you
12 has to type everything you say.

13 A I understand that.

14 Q Okay.

15 THE COURT: Make sure that you use verbal
16 responses.

17 THE WITNESS: Yes, Judge.

18 THE COURT: Thank you.

19 Q So what happened as you were there in the kitchen with
20 Mr. Wilber? What happened between you two?

21 A We had a little confrontation about why I was pumping my
22 chest out to him or something to that effect.

23 Q Why you were pumping your chest out to him?

24 A Right.

25 Q And were you doing that?

1 A No.

2 Q What does that mean to pump your chest out at somebody?

3 A I don't know what the definition would be for that.

4 Q Well, how would you perceive it as best you recall? When

5 Danny Wilber told you that, when he said -- what did he

6 say to you, why are you pumping your chest out at me?

7 A Right.

8 Q What did you think he meant by that?

9 A I couldn't tell you to be honest.

10 Q Well, did he say it in a way that made you nervous,

11 scared, happy, sad, elated, thrilled, depressed? What was

12 your reaction to it?

13 A Mind my own business, continue doing what I was doing. I

14 was talking to Donald and a friend of mine.

15 Q You were talking to Donald?

16 A Yes --

17 Q And that would --

18 A -- and Endalia.

19 THE COURT: Are you saying Donald and

20 Endalia?

21 THE WITNESS: Yes..

22 THE COURT: Thank you.

23 Q And at that point since you were just minding your own

24 business, did Mr. Wilber just leave it alone?

25 A Something happened where the tension was off me now.

1 Q Well, before the attention was off you though, when he
2 first said to you why are you poking your chest out at me
3 or words to that effect that was between you two, it was
4 just words?

5 A No, I said I am not pumping my chest out towards you.

6 Q And what did he say?

7 A I don't even remember.

8 Q Well, did anything else happen between you two? Let me be
9 more specific. Did Mr. Wilber ever touch you?

10 A He grabbed my shirt.

11 Q Now, as you do -- as you say that, you are taking both of
12 your hands kind of right around your chest area and taking
13 your shirt into your fists. Right?

14 A Right.

15 Q And why did he do that?

16 A I couldn't tell you.

17 Q What happened when he grabbed your shirt? What happened
18 when he grabbed your shirt?

19 A My chain came off.

20 Q Do you remember telling the police that Slim approached
21 you and pulled the chain off breaking it?

22 A I remember telling them that, but I didn't tell them in
23 those words.

24 Q How did you say it?

25 A I said he grabbed my shirt and at that time my chain came

1 off.

2 Q So the whole chain coming off was just sort of a -- an
3 accident, a byproduct or whatever of him grabbing your
4 shirt?

5 A Right.

6 Q And what did he do when your necklace came off?

7 A He just had it. He threw it back at me.

8 Q So it didn't just -- it broke off or came off and it was
9 in his hand?

10 A Right.

11 Q And he threw it back at you?

12 A Right.

13 Q Had you and Mr. Wilber had some kind of dispute?

14 A No, we didn't.

15 Q I mean, was there some bad blood between you two before
16 all this happened?

17 A No, there wasn't.

18 Q Had he tried to buy that chain from you?

19 A Not that I recall.

20 Q What kind of chain was it?

21 A As in -- what do you mean what kind of chain? It was a
22 gold chain.

23 Q Where was it on your body, I mean, was it like one of
24 those kind of a big old, you know, hang down to your navel
25 kind of chain or what?

1 A Probably.

2 Q Probably?

3 A It was, yes.

4 Q After he pulled it off your neck, was it so broken you had
5 to throw it away or what?

6 A No.

7 Q And what was it that ended the confrontation between you
8 and Mr. Wilber?

9 A Some gentlemen came in from out the -- out the living room
10 into the kitchen and told everyone in there to take it
11 easy.

12 Q And of the -- when you say everyone in there, are you
13 talking about everyone in the kitchen?

14 A No. I shouldn't say everyone, but a few gentlemen that
15 came from the living room tried to come in there and calm
16 everything down.

17 Q And in -- you are talking about calm everything down in
18 the kitchen?

19 A Right, as in the dispute with me and Mr. Wilber.

20 Q And did you need calming down?

21 A I didn't need calming down.

22 Q So who needed calming down?

23 A Danny.

24 Q At that point like a second or two before those guys show
25 up in the kitchen and tell him to calm down or whatever,

1 describe him.

2 A I can't describe him. I -- how would you want me to

3 describe him? What do you mean by describe him?

4 Q Was he geeked up?

5 A A little bit. Adrenaline was probably rushing.

6 Q Was he aggressive?

7 A I don't know what you would call it.

8 Q Was he pumped up?

9 A I don't know.

10 Q You don't know?

11 A No, I don't.

12 Q How drunk was he?

13 A I don't know how drunk he was. I wasn't watching what he

14 was drinking.

15 Q Well, but you had been around drunk people before. Right?

16 A He wasn't sloppy drunk. He wasn't throwing up or falling

17 over.

18 Q Were you surprised at what was going on between him and

19 you?

20 A A little bit.

21 Q Scared?

22 A No.

23 Q Do you remember the guys that came into the kitchen to try

24 and calm him down?

25 A Yes, I do.

1 Q What were their names or nicknames?

2 A Rock and Vato.

3 Q Rock and Vato?

4 A Yep.

5 Q I'm going to show you a couple of photographs, one is a

6 Polaroid marked No. 8. Do you recognize the guy in that

7 picture?

8 A Yes, I do.

9 Q Who is that?

10 A That's Vato.

11 Q That's one of the guys that tried to calm the defendant

12 down?

13 A Yes, it is.

14 Q And Exhibit No. 21, do you recognize that guy?

15 A Yes.

16 Q Who is that?

17 A Rock.

18 Q Rock. Did you know -- back when all this was going on and

19 you were there on Mineral, did you know their names other

20 than Rock and Vato?

21 A Yes.

22 Q Okay. And what was Vato's name?

23 A Richard Torres.

24 Q How did you know him?

25 A Just from around.

1 Q I mean, how did you know his name?

2 A I think we were in the House of Corrections together

3 before.

4 Q And what about Rock?

5 A Rock, just a friend from around the neighborhood.

6 Q Good guys, bad guys, okay guys?

7 A Good guys. Average guys.

8 Q Okay. Either one of them ever snatch a chain off your

9 neck --

10 A No, they haven't.

11 Q -- or do anything like that? Did either of those guys --

12 THE COURT: Hang on just a minute,

13 Mr. Griffin. Is that --

14 THE WITNESS: No. I'm sorry, Judge.

15 Q Did either Rock or Vato that night ever do anything to

16 provoke Mr. Wilber? Other than respond to things he may

17 have done, but did they ever do anything other than try to

18 get him to calm down?

19 A No.

20 Q In that house that night the time you were there who is

21 the only guy that could be described as out of control?

22 A I don't know.

23 Q You are not sure?

24 A I'm not sure.

25 Q Who else besides Danny Wilber fought with you?

1 A No one.

2 Q Who else did other people have to tell to chill out or
3 calm down?

4 A No one.

5 Q Only him?

6 A Only him.

7 Q Was there anyone else there that made you nervous or
8 scared or anything like that at all?

9 A No one, not even him.

10 Q Did you ever see Mr. Wilber throw a chair?

11 A No, I didn't.

12 Q Did you tell the police he did?

13 A No, that was never in none of my statements.

14 Q Did you ever tell the police that Rock told Slim to chill
15 out. Slim then threw the chair at Oscar and walked over
16 towards Rock?

17 A No.

18 Q Never told them that?

19 A No.

20 Q I'm going to show you, Mr. Niles, what's been marked as
21 Exhibit 36.

22 MR. CHERNIN: Can I see which one you are
23 referring to.

24 Q Take a look at it. The sticker is on the very back page
25 on the back. When you turn that over, does it say 36?

1 A Yes, it does.

2 Q What is that?

3 A What is what?

4 Q What is Exhibit 36?

5 A My statement.

6 Q One of your statements?

7 A Yes.

8 Q Okay. I'm going to ask you to -- did you ever sign that
9 statement?

10 A Yes, I did.

11 Q Okay.

12 A Now, is this -- am I going to see in here that I seen him
13 throw a chair or am I going to see --

14 THE COURT: Mr. Niles, you have to wait
15 until he asks you a question. We don't know what he's
16 going to ask you.

17 THE WITNESS: I'm sorry.

18 Q On the very bottom of the first page Slim then threw the
19 chair. Do you see that?

20 A No, I don't. I see Slim then threw the chain.

21 Q The chain?

22 A Yes, the chain.

23 Q At?

24 A Me, the table -- the kitchen table.

25 Q Did he ever knock over or throw a chair?

1 A No.

2 Q And what did he do then after he threw the chain back at

3 you?

4 A He got into a confrontation with Rock and Vato.

5 Q What happened? Where?

6 A In the kitchen.

7 Q Where in the kitchen?

8 A In the kitchen -- what do you mean where in the kitchen?

9 Q By the stove, by the refrigerator, near the bathroom?

10 A I think by the stove.

11 Q Do you remember that kitchen very well?

12 A Somewhat.

13 Q To your right there's a diagram. You can step off the

14 witness stand and take a look at it for a minute because

15 then I'm going to ask you some questions. Okay.

16 THE COURT: Are you going to be asking him

17 to point at things? There's a pointer right on the

18 witness stand.

19 Q You want to hold that. There we go. Do you recognize

20 this as sort of a diagram of that particular residence

21 there on Mineral?

22 A Right, it looks familiar.

23 Q It's not to scale, okay, just so you know, but in the --

24 is this -- as you come into the front door of that

25 residence, you are in sort of a living room area?

1 A Yes.

2 Q When you came in, did you head straight back into the
3 kitchen?

4 A Yes.

5 Q And the kitchen is sort of at the top of this diagram or
6 in that house it was in the back.

7 A Yes.

8 Q Where were you in the kitchen when the defendant grabbed
9 your chain as best you recall? So for the record you are
10 pointing to the -- the table, the square in the kitchen
11 area with the No. 2 in the circle?

12 A At the bottom.

13 Q Sort of the bottom left-hand corner a little bit off of
14 that?

15 A Right.

16 Q That's where you were standing when the defendant grabbed
17 your chain?

18 A Yes.

19 Q Which way were you facing, in other words, were you facing
20 eastbound or were you facing westbound or north or south?

21 A I was probably facing this way.

22 Q The confrontation between you and the defendant takes
23 place approximately in the area that you pointed to before
24 then. Right?

25 A Correct.

1 Q And where do Rock and Vato come from?

2 A The living room.

3 Q Did you see them come walking into the kitchen?

4 A Yes, I did.

5 Q Did they come right up to the defendant over in the area

6 where you and Mr. Wilber were?

7 A No, somehow they moved over here.

8 Q Right now you are pointing to the area which again if we

9 look at the square with No. 2 in it would be just to the

10 right of that square on this diagram. Right?

11 A Yes.

12 Q Just above the -- the head of the guy that -- that's --

13 the victim in this area?

14 A Yes.

15 Q And what happened over there?

16 A A little tussle between the three of them.

17 Q Between the three of them?

18 A Yes.

19 Q When you say a little tussle, what was it that you saw?

20 A Three guys wrestling.

21 Q Wrestling?

22 A Yes.

23 Q Did you see specifically what Mr. Wilber was doing?

24 A No, I didn't.

25 Q Did you ever see him punch or choke anyone?

1 A I didn't see -- it was like a tussle. I didn't -- there
2 was too much going on. I don't recall what he was doing
3 or what they did, every move they made, I couldn't tell
4 you.

5 Q Did they stay according to your recollection pretty much
6 in this area here that you've talked about before to the
7 right of the kitchen table?

8 A Yes.

9 Q Where did you go?

10 A I stayed right here the whole time.

11 Q Where was Antonia West?

12 A I think she was right here.

13 Q Okay. And when you say right here, you are pointing to
14 what's now marked in the area of the kitchen where there's
15 a measurement where it's written 12 feet 8 inches?

16 A Right.

17 Q You recall her right there?

18 A Yes.

19 Q How close was she to the guys that were tussling?

20 A I can't remember.

21 Q A few feet?

22 A I can't remember.

23 Q What was she doing?

24 A Just standing there.

25 Q Was she looking at you?

1 A No.

2 Q What was she doing?

3 A She was just standing there. I don't know what she was
4 doing.

5 Q And what about Donald Jennings, where was he?

6 A He might have been somewhere around here. He was by me.

7 Q And you are pointing to this line here that sort of
8 represents a line of cabinets sort of near the sink that's
9 drawn in here?

10 A Correct.

11 Q Again on this particular diagram --

12 MR. GRIFFIN: I don't know how else to
13 describe it, Judge, other than -- do you want me to
14 describe it further for the record?

15 THE COURT: That's fine.

16 Q What was Donald Jennings doing?

17 A Just standing there.

18 Q Which way was he looking?

19 A I think he was looking this way towards me.

20 Q Up in this area are Vato, and Rock, and Danny Wilber.
21 Anybody else go up in that area?

22 A I don't think so.

23 Q At what point if any did you become aware of David Diaz in
24 that area?

25 A I don't think I became aware of when he came in.

1 Q At all?

2 A At all.

3 Q Did you ever see --

4 A But I kind of did see him standing right up here. I'm not
5 aware of when he came into the kitchen.

6 Q At some point you became aware that David Diaz was in the
7 kitchen?

8 A Right.

9 Q And from your angle right here -- again pointing over to
10 what would be just off the bottom left corner of the
11 table -- you could see him in the kitchen?

12 A Right.

13 Q How close was he to the door?

14 A Not too far from the door. It might have been right next
15 to the door.

16 Q I'm going to show you what's been marked as Exhibit 15.
17 Do you recognize that?

18 A Yes, I do.

19 Q Okay. What is it?

20 A The kitchen.

21 Q The kitchen where this all took place?

22 A Right.

23 Q And this edge of the table here is sort of right in the
24 middle, the one in the -- off to the left side. You were
25 sort of standing over near that edge of the table or

1 closest to that edge of the table?

2 A Correct, over this way somewhere right around here.

3 Q Sort of where that bottle is on the floor?

4 A Like where I told you on the diagram, yep.

5 Q Okay. And Mr. Diaz you said you thought he was standing

6 right by -- when you say the door, are you referring to

7 the white door that we see in Exhibit 15?

8 A I'm referring to the doorframe from the living room to the

9 kitchen.

10 Q Okay. Do you see that on here?

11 A No, I don't.

12 Q I'm going to show you what's been marked as Exhibit 25.

13 Do you see the doorframe you are talking about here?

14 A Right.

15 Q Can you point to it for the jury. Okay. There's sort of

16 one doorframe a little closer to what would be the living

17 room, right, and one that's a little closer to the

18 kitchen?

19 A Right.

20 Q And there's stairs that go upstairs this way?

21 A I don't -- I don't remember stairs.

22 Q How -- where was Mr. Diaz?

23 A He was in the doorframe.

24 Q This -- which one, the one closer to the living room or

25 the one closer to the kitchen?

1 A The one closest to the kitchen.

2 Q How far into the kitchen did he get?

3 A Not too far.

4 Q How long does this -- do you recognize this as a stove or
5 you don't remember if that's a stove up there?

6 A I can't remember.

7 Q Okay. I'm going to refer to this -- I know you don't
8 know, but I'm going to call this thing a stove, okay,
9 because it's on the diagram up in the top right-hand
10 corner. As opposed to keep saying the box up in the upper
11 right-hand corner, I'm just going to say the stove. How
12 close to the stove were Vato, and Rock, and Mr. Wilber
13 when they were struggling as best you recall? In other
14 words, if the table is about right here and this what I
15 call a stove is up in this corner, where were they?

16 A Probably around here like I said earlier.

17 Q And you are circling an area again off what would be the
18 top right-hand corner of the table?

19 A Right.

20 Q At any point did this particular group of guys here move
21 down toward where Mr. Diaz was?

22 A Not that I can recall.

23 Q Were you watching them the whole time?

24 A Sort of.

25 Q At some point when this struggle is going on is there a

1 gunshot?

2 A Yes, there was.

3 Q When the gunshot went off, what were you looking at?

4 A I don't remember.

5 Q What did you do?

6 A What did I do? I ran out the house.

7 Q No, after the gunshot. When the gunshot goes off, boom --

8 A Okay.

9 Q -- what did you do?

10 A Run out the house.

11 Q Did you duck down or look around to see where it was

12 coming from?

13 A I looked around, I mean, yeah, that's common sense.

14 Q What's common sense?

15 A To look around before I make a movement out of the

16 kitchen.

17 Q Didn't you throw your hands up in the air like you are

18 scared or something like that?

19 A I don't think so.

20 Q Isn't that sort of what you should do when you hear a

21 gunshot?

22 A No, you should look around.

23 Q What about ducking?

24 A Yeah.

25 Q When you ran out from here, did you take the most direct

1 route, in other words, across the kitchen, down the
2 hallway and out the front door?

3 A Yes, I did.

4 Q And how did you get out? In other words, how did you get
5 out of that area -- bus, taxi, ride?

6 A Jaimie.

7 Q Jaimie who?

8 A I don't -- Jaimie.

9 Q Is she a white woman --

10 A Yes.

11 Q -- Jaimie Williams do you know?

12 A Jaimie and Lea.

13 Q Jaimie and Lea, you got in their car?

14 A Yep.

15 Q Did you see the victim fall -- did you see Mr. Diaz fall
16 down?

17 A Yes, I had to get past him in order to get out the house.
18 I did see him laying on the ground.

19 Q Why did you run out?

20 A Why wouldn't I run out. Everyone ran out.

21 Q Well, did you think about helping him?

22 A No. I don't want no part in it.

23 Q When did you call the police?

24 A I didn't call the police.

25 Q So the police found you?

1 A Yes.

2 Q And when the police talked to you the first time, did you

3 tell them everything?

4 A No, I didn't.

5 Q Why not?

6 A 'Cause I was scared and I didn't want to have no part in

7 it.

8 Q What were you scared of?

9 A Them bothering me, keep coming to my mom's house.

10 Q How long did it take the police to find you?

11 A Two days.

12 Q And during those two days how many times did they stop by?

13 A More than twice.

14 Q You know what they wanted. Right?

15 A They wanted to talk to me about what happened at this

16 party.

17 Q And what was -- what was it that had happened in the party

18 that you were so afraid to talk to the police about?

19 A About everything. I didn't want no part in it pointblank.

20 Q Do you remember telling the police the second time they

21 talked to you that you had not told the first set of

22 detectives the truth because you were afraid for your

23 family?

24 A Yes.

25 Q Why?

1 A Because the detectives keep being a nuisance to my mom's
2 house.

3 Q But why would that make you afraid for your family?

4 A Just everything in general. It's a murder.

5 Q Right, but you didn't see who did it?

6 A It's a homicide.

7 Q Did you see who did it?

8 A No, I didn't.

9 Q So why would you be afraid? You couldn't point the finger
10 at anybody.

11 A Because I didn't want to talk to them.

12 Q Right, I understand you don't want to talk to them, that
13 part I got, but why did you tell them that you were afraid
14 for your family?

15 A I couldn't tell you. That's what I told them at the time.

16 Q Do you remember telling the police that when you saw a
17 ball of guys tussling, the victim, David Diaz, was
18 standing next to the group but not fighting?

19 A Yes.

20 Q Was he standing next to the group or in that doorway that
21 you had him in when we talked about that picture before?

22 A He was standing in the doorway that was not too far from
23 where the tussle was going on. The map here is very big,
24 but the kitchen itself is small.

25 Q Well, when we talk about the group that's fighting or

1 tussling that includes Mr. Wilber -- and we're looking at
2 Exhibit 14 right now -- which side of the table are they
3 on?

4 A This side of the table.

5 Q So you are pointing at the floor area that would be
6 between the stove and the table?

7 A Right.

8 Q And I'm assuming then that Mr. Diaz was way back here
9 behind those cabinets and the doorframe?

10 A Mr. Diaz was right here. That's where the doorframe is.

11 Q Can you see -- could you see the doorframe --

12 A I'm not going by every inch -- I'm not telling you every
13 inch and centimeter, I'm telling you where it is. He was
14 right here. The tussle was right here.

15 Q In other words, Mr. Diaz was far enough into the kitchen
16 area that you standing over by this end of the table could
17 see him?

18 A Somewhat.

19 Q And -- somewhat?

20 A Somewhat, yep.

21 Q And he was in far enough that he wasn't actually in the
22 doorframe that you talked about before, in other words,
23 you don't remember him standing directly under that
24 doorframe. Do you?

25 A No.

1 Q In Exhibit 25 you said he was right by this -- this
2 doorframe, this -- the one closer to --
3 A He wasn't under the doorframe, he was by the doorframe.
4 Q In the kitchen?
5 A You see the difference?
6 Q Right. And if you had to guess -- closest estimate -- not
7 guess, estimate -- the group of guys tussling are how many
8 feet away from Mr. Diaz -- Mr. Diaz, the guy that got
9 shot?
10 A I don't think I could estimate that correctly.
11 Q Well, everything is pretty small in there. Right?
12 A Yeah. I don't think I could estimate that correctly.
13 Q When the shot went off, were you looking at the guys
14 tussling, were you looking at Mr. Diaz, were you looking
15 at Endalia, were you looking at Donald Jennings, were you
16 looking at your shoes?
17 A I was looking at my chain.
18 Q At your chain?
19 A Yes, I had it in my hand. I was trying to fix it.
20 Q And all of a sudden boom?
21 A Yep.
22 Q How were you trying to fix your chain? What was wrong
23 with it?
24 A One of the clamps was out like it's been spread open when
25 it should have been welded together like this.

1 Q So that it didn't form a chain, it was like a -- just a
2 loop -- or I mean a long string now. Right?

3 A Yes.

4 Q Okay. And how did you determine that, you were looking at
5 it in the party?

6 A Yes.

7 Q So while the tussling goes on, at one point you decide to
8 look down and start fixing your chain and then boom, the
9 shot goes on?

10 A No, I been doing this from the get-go after this happened.

11 Q So after Mr. Wilber snatches your chain, Vato and Rock
12 come up and tell him to chill out?

13 A Correct.

14 Q And that gets Mr. Wilber to fighting with them. Correct?

15 A Correct.

16 Q He doesn't just chill out?

17 A No.

18 Q Who started the tussling?

19 A I didn't see who started the tussling.

20 Q The tussle is going on over there while you are trying to
21 fix your chain?

22 A At the same time I -- I'm not just saying I was fixing my
23 chain -- just fixing my chain, because if there's
24 commotion in the whole kitchen, I'm not gonna be just
25 worrying about my chain --

1 Q So you are doing both?

2 A -- you understand. Yes.

3 Q Were you trying to roll a blunt for Donald Jennings?

4 A Yes, I was, but I think that might have took place before

5 this.

6 Q Did you ever get that thing rolled up?

7 A I don't remember.

8 Q Did you ever smoke it?

9 A I don't remember.

10 Q You don't remember if you smoked a blunt there that night

11 or that morning?

12 A There's too much going on. That was about last year some

13 time.

14 Q So as you are fixing your chain and watching the tussle

15 and seeing Mr. Diaz in the doorway, boom, a shot goes off?

16 A Correct.

17 Q Did you ever see Danny Wilber punch Vato?

18 A No, I didn't.

19 Q Did you ever see him choke Rock?

20 A No, I didn't.

21 Q Did you ever see Vato grab Mr. Wilber from behind?

22 A No, I didn't. I told you, I didn't see what moves they

23 were making. I just know it was (unintelligible

24 response.) Everyone was getting into it pointblank. Out

25 of those three I don't remember who did what, who choked

1 who.

2 Q And after a shot went off, what did you look at?

3 A I told you, I looked everywhere, I looked around.

4 Q And what was Mr. Wilber doing?

5 A Trying to get out. He checked himself.

6 Q He checked himself?

7 A Yeah.

8 Q And you remember that?

9 A Yes.

10 Q And did you check yourself?

11 A No, I didn't.

12 Q So the only guy --

13 A I wasn't one of the guys fighting. Now if I would have

14 been fighting, I would have checked myself, maybe I would

15 have got shot.

16 Q So you are saying one of the guys fighting is the kind of

17 guy that is in the mindset that he might pull out a gun

18 and shoot somebody?

19 A Repeat that.

20 Q That you -- if you had been fighting, you would have

21 checked yourself?

22 A To see if I got shot whoever opposing -- whoever the

23 opposing person was.

24 Q Because the kind of guys in that tussle might pull out a

25 gun and shoot?

1 A I don't know.

2 Q That would be your mindset if you had been in a tussle?

3 A If I was fighting, yes, why wouldn't they.

4 Q Why wouldn't you?

5 A If I was fighting someone and I heard a gunshot, I would
6 check myself 'cause maybe I could have got shot by someone
7 I was fighting with.

8 Q Do you remember telling the police that: I said before,
9 the victim, David Diaz, was standing next to the group,
10 but not fighting. Oscar states he was moving towards the
11 door to leave, then he heard a shot, he and Endalia ran
12 out of the house?

13 A I probably did. Now is that before I gave them my last
14 statement?

15 THE COURT: Again, they are going to ask
16 you that.

17 THE WITNESS: Oh, okay.

18 Q This is -- you agree that in your first statement you
19 basically lied to the police and said you left before the
20 shooting?

21 A Right.

22 Q Okay. So that one you agree wasn't true?

23 A Wasn't true.

24 Q And in what I will call the second statement is the one
25 where you told them that you hadn't told them the truth in

1 the first statement because you were afraid for your
2 family?

3 A Right.

4 Q And that's the one that you have in front of you right now
5 that is marked I think Exhibit 36 on the back?

6 A Yes.

7 Q And I'm looking at Page 2 about half way down, you see
8 where Endalia is underlined there?

9 A Yes.

10 Q Okay. That's the part I just read. You want to take a
11 minute and read it.

12 THE COURT: Did you read it?

13 THE WITNESS: Yes, I did.

14 THE COURT: He's read it.

15 Q So this is right about -- you are talking to the police.
16 This is the part where the actual shooting happened,
17 right -- this is the part of your statement where you are
18 talking about that?

19 A Right.

20 Q Oscar states he didn't see Slim with a gun. He didn't see
21 who shot David. He knew David got shot, but didn't
22 actually see the shooting. Is that right?

23 A Oscar states he didn't see Slim with the gun. He didn't
24 see who shot David, correct.

25 Q Anything in there about seeing Mr. Wilber patting himself

1 down?

2 A Is that on this Page 2?

3 Q Yeah, in that part. You see it? If you want to take a
4 minute and read the whole thing and you can just tell me
5 where the part is about him patting himself down.

6 THE COURT: I don't see where it says Slim
7 patted himself down.

8 MR. GRIFFIN: Where -- I'm sorry, where
9 what?

10 THE WITNESS: What did you say, where Slim
11 was patting himself down?

12 MR. GRIFFIN: Yeah.

13 A I don't see that.

14 Q Is it in any of your statements, sir, to the police -- the
15 ones that you signed I mean?

16 A Probably. Did you see it? I don't know.

17 Q On that particular one, your second one -- which by the
18 way was on February 5th of 2004, correct, just a few days
19 after the shooting?

20 A Yes.

21 Q It said you then ran out of the house and ran to Lea's
22 car. Correct?

23 A Correct.

24 Q What happened in Lea's car?

25 A She got a call from Tony and he wanted to speak with me.

1 Q Who is Tony?

2 A Tony Valdez.

3 Q I'm going to show you a photograph marked Exhibit 18. I'm

4 going to see if this is the Tony Valdez you are talking

5 about.

6 A Yes, it is.

7 Q It is?

8 A Yes.

9 Q What did he want to talk to you about?

10 A He asked me what happened at the party.

11 Q How had he hear about it?

12 A I think Lea might have told him. I'm not sure how he

13 found out about it, I just know what he told me on the

14 phone.

15 Q Do you remember Antonia West saying anything there in the

16 car?

17 A No, I don't.

18 Q Do you remember Donald Jennings saying shut the fuck up?

19 A No, I don't. I think some people were making a few

20 comments like that's fucked up, but I don't remember

21 anything else.

22 Q I'm going to show you a photograph marked Exhibit 19. Do

23 you recognize that guy?

24 A Yes, I do.

25 Q Who is he?

1 A That's Javi.

2 Q Who is he with respect to Danny Wilber?

3 A A friend. What do you mean with respect to Danny Wilber?

4 Q A friend, enemy, a business associate?

5 A Associate probably.

6 Q Associate?

7 A Yeah.

8 Q What's the difference -- well, never mind. In the moments
9 before the shooting there, did you see Javi, the guy in
10 that picture, come into the kitchen as well?

11 A Probably. Like I said in my statement, I couldn't recall
12 if it was Javi, but someone else came in there to try to
13 calm everything down too.

14 Q Now, at the very back of that statement, the very last
15 page is sort of a -- a sketch or a --or a map -- really a
16 sketch I guess of that house, right -- a hand drawn
17 sketch. Correct?

18 A Correct.

19 Q And you've seen that before?

20 A Correct.

21 Q Did the police ask you to point out to them where everyone
22 was as best you could recall, things like that?

23 A Yes, they did.

24 Q Okay. And in this particular one, the one that you did,
25 this -- this is actually the second one you did. Right?

1 The first one you did you didn't mention to the police
2 anything about any tussle or anything like that. You want
3 me to show it to you?

4 A Yes.

5 Q Sure. In -- when the police talked to you for the first
6 time --

7 A Yeah, I didn't tell them any of that because I didn't want
8 to have no part in it, that's what I told you earlier.

9 Q But my point is you did this particular sketch with them.
10 Correct?

11 MR. CHERNIN: May I please, which exhibit
12 is that?

13 MR. GRIFFIN: 35, his first statement.

14 THE WITNESS: Yeah, what are you trying to
15 say?

16 MR. GRIFFIN: Hang on.

17 MR. CHERNIN: I'm sorry, I want to see
18 which one is which.

19 Q Do you agree that this is a copy of that first statement
20 that you gave the police?

21 A Yes.

22 Q And the first time they brought the sketch in, all you
23 showed them was you, and Slim, and Endalia over there by
24 the table. Correct?

25 A Correct.

1 Q You didn't mention anything about anything else at that
2 party because you told them you had left before the
3 shooting the first time you talked to the police?
4 A I don't think I told them too much.
5 Q Right?
6 A I didn't tell them too much.
7 Q And when you did this diagram, you weren't talking about
8 where anyone was when the shooting or any tussle or
9 anything like that happened. Right?
10 A No.
11 Q So this one has got just Endalia, Oscar meaning you, and
12 Slim. Correct?
13 A Correct.
14 Q Right over here by the table?
15 A Correct.
16 Q Okay. And then when you talked to them the second time,
17 they pull out a copy of this. Right? When you talk to
18 them then the second time, they make a copy of that thing
19 and you add things to it. Right?
20 A Right.
21 Q You add information?
22 A Yeah, once they show me everyone's statement.
23 Q Okay.
24 A They told me that these people are telling them what
25 happened, why do I keep lying to them.

1 Q And you were lying to them?

2 A That's when I told them the truth.

3 Q Okay.

4 A When they showed me these five statements saying this is

5 what happened, look here.

6 Q And then you realized I don't need to be afraid for my

7 family anymore because I'm not the only one?

8 A No, then I realized it's time to get down to business and

9 tell them what happened.

10 Q Okay.

11 A They already know pointblank.

12 Q And in this particular drawing you add in a few things.

13 Correct?

14 A Correct. I added in what they wanted in, what they needed

15 to know, what they wanted to hear.

16 Q Okay. So you just told them what they wanted to hear. Is

17 that what you are saying?

18 A Not necessarily.

19 Q Okay. Did you tell them the truth ever? Did you ever get

20 to the point where you said I'm just going to tell them

21 the truth?

22 A Yeah.

23 Q And the truth --

24 A You seen my statement. Right?

25 Q I'm confused because I thought you just said you told them

1 what they needed to hear or wanted to hear.

2 A What they needed to hear.

3 Q Okay. And what did they need to hear?

4 A The truth.

5 Q The truth, okay. So you agree that at some point you told

6 them the truth?

7 A Yes.

8 Q Okay. In this particular document, the last page of

9 Exhibit 36, up by the stove there's a little circle with

10 some names next it to. Right?

11 A Right.

12 Q What names?

13 A Rock, Vato, Slim, and David.

14 Q Rock, Vato, Slim, and David. Right?

15 A Yes.

16 Q The three guys who are friends and Mr. Wilber?

17 A Right.

18 Q And then you have a couple other guys in there, a

19 couple -- what does it say -- a couple of Hispanic males?

20 A Unknown.

21 Q Unknown. Do you remember who they were or what race they

22 were or anything?

23 A That's why it's unknown, I don't remember.

24 Q Who is the tallest guy in that group?

25 A Mr. Wilber.

1 Q By how far? At least a foot over everybody?

2 A I'm not sure.

3 Q Was there anybody there that was even close to his height?

4 A I don't think so.

5 Q How tall is he?

6 A I don't remember.

7 Q Best estimate?

8 A I don't know.

9 Q Best estimate.

10 A 6 -- 6' -- 6'1", 6'2", 6'3".

11 Q You think he's 6'2" or 6'3"?

12 A I don't know.

13 Q So in your second drawing here, other than the two or

14 three unknown guys, the four guys are Rock, Vato, Slim,

15 and David. Is that right?

16 A Correct.

17 Q And this would have been at the moment of the tussle and

18 the moment the gunshot went off the way you were telling

19 it to the police on February 5th, just four or five days

20 after it happened?

21 A What about it? Could you repeat yourself, please.

22 Q You've got Rock, Vato, Slim and David all right in that

23 little circle on this diagram. Correct?

24 A Correct, but I don't think I was -- that David was in the

25 circle, I never said that. I'm saying who was all on this

1 side, who was lined up on the other side of me.

2 Q Right. What you said was the victim, David Diaz, was
3 standing next to the group but not fighting?

4 A Right. And I didn't say necessarily next to the group.

5 Q So you didn't say necessarily next to the group and you
6 didn't necessarily say --

7 A He was there on the side of the wall where it was going
8 on.

9 Q And then the police talked to you again --

10 THE COURT: One moment. Sidebar with the
11 lawyers.

12 (Whereupon, an off the record discussion
13 was had.)

14 THE COURT: All right.

15 (The following proceedings were held
16 outside the presence of the jury.)

17 THE COURT: Mr. Niles, I've allowed it to
18 go for a little bit and I didn't want to embarrass you in
19 front of the jury, that's why I've sent them out, but you
20 are to respond to the questions that are put to you by
21 counsel.

22 THE WITNESS: All right.

23 THE COURT: It is unimportant for purposes
24 of these proceedings whether you like the question, don't
25 like the question, like the person asking it, don't like

1 the person asking it. You are to respond to the question.

2 THE WITNESS: All right, Judge.

3 THE COURT: In addition, no more facial
4 gestures or acknowledgement of any kind. You know what
5 I'm talking about 'cause I saw you do it, and you
6 immediately knew I saw you do it so you looked at me.

7 THE WITNESS: Yeah.

8 THE COURT: Don't do that again. You do
9 that again, I'm going to admonish you in front of the
10 jury. You understand what I'm saying?

11 THE WITNESS: Yes, I do, Judge.

12 THE COURT: The witness was getting a
13 little agitated up here in response to comments --

14 THE WITNESS: He keeps asking --I'm sorry.

15 THE COURT: The witness was getting a
16 little agitated in response to questions by counsel and at
17 one point after he had in his opinion -- or my surmising
18 what he's thinking is he showed Mr. Griffin. He winked or
19 acknowledged Mr. Wilber in the witness stand as if he was
20 holding his own up here on the witness stand. He knows he
21 did it, I know he did it, he looked right immediately at
22 me 'cause he knew I caught him doing it. I don't want
23 that to go on at all again. That's it. Mr. Wilber, I
24 don't think this is funny. Do you?

25 THE DEFENDANT: I just don't understand --

1 THE COURT: I don't think this is funny.
2 Do you?

3 THE DEFENDANT: I just don't understand
4 where all this stuff is coming from.

5 THE COURT: You don't. Do you? You are an
6 innocent in this whole thing.

7 THE DEFENDANT: I'm an innocent in this
8 whole thing. I'm innocent of all charges.

9 THE COURT: And you have not instigated
10 anything in this courtroom, you have not acted
11 inappropriately to the Court or anyone in this courtroom
12 during the duration of the trial. Is that what you are
13 telling me?

14 THE DEFENDANT: I'm innocent of all
15 charges.

16 THE COURT: I'm not talking about your
17 innocence to these charges. I'm talking about your
18 behavior in this courtroom.

19 THE DEFENDANT: And what you are referring
20 to right now as far as what Mr. Niles did, I have no
21 knowledge of what he is doing.

22 THE COURT: Then all you need to do is say
23 that to your lawyer. You don't need to --

24 THE DEFENDANT: That's what I did. You
25 started speaking to me, Your Honor.

1 THE COURT: And I said we don't need to
2 smile or laugh about these things because that's exactly
3 what you were just doing. Mr. Chernin, you can call it
4 anything you want, but the Court is not stupid.

5 MR. CHERNIN: Your Honor, I --

6 THE COURT: The Court has eyes.

7 MR. CHERNIN: Your Honor, I don't know what
8 you are talking about.

9 THE COURT: And I observed him just
10 laughing again at what was going on. I think it's
11 perfectly acceptable for the Court to find out if there is
12 something about what I'm saying that's funny and I would
13 like to know about it.

14 MR. CHERNIN: Judge, I don't think there's
15 anything funny about what you are saying, but I have no
16 idea what you are talking about now when you are
17 addressing me about it. I'm sorry. I missed what --
18 who -- I don't even know who this -- was I smiling or was
19 Mr. Wilber smiling?

20 THE COURT: Mr. Wilber.

21 MR. CHERNIN: Okay. I didn't see that,
22 so -- and if -- and was he smiling to Mr. Niles before?

23 THE COURT: To you.

24 MR. CHERNIN: To me when?

25 THE COURT: Just now, Mr. Chernin.

1 MR. CHERNIN: Okay. If he -- if that's
2 what the Court thinks, I --

3 THE COURT: No, I don't think that, I know
4 it and I know it because I observed it. Now it's going to
5 stop because I'm quite honestly at the end of my rope and
6 I'm a little tired of having to be restrained here. I'm
7 not going to be restrained again. I have been exemplary
8 in my restraint. Do not please in any way, shape or form
9 mistake my kindness for weakness. Are we communicating,
10 gentlemen? Are we communicating, gentlemen?

11 MR. GRIFFIN: Yes.

12 MR. CHERNIN: Are you -- you -- I don't
13 know who you are addressing. I'm sorry, if you are
14 addressing me, I --

15 THE COURT: I'm looking right at the four
16 of you gentlemen sitting at these tables.

17 MR. CHERNIN: Okay. I understand what you
18 are saying.

19 THE COURT: Thank you. Communicate it to
20 your client. Don't mistake my kindness for weakness. Big
21 mistake. Big mistake. Let's bring the jury back out.

22 THE WITNESS: Your Honor --

23 THE COURT: That's it.

24 (The following proceedings were held in the
25 presence of the jury.)

1 THE COURT: Mr. Griffin, you may continue.

2 CONTINUED DIRECT EXAMINATION BY MR. GRIFFIN:

3 Q Mr. Niles, as you are standing there by the kitchen table,
4 where did the shot come from?

5 A I don't know.

6 Q As best you remember.

7 A I don't know.

8 Q Did it come from the living room?

9 A I don't know.

10 Q How loud was it?

11 A As in a bang -- just a bang. I don't know how loud it
12 was.

13 Q Was there much of an echo to it?

14 A Not that I can recall.

15 Q Do you recall telling the police that you heard a gunshot
16 come from the area where the tussle was?

17 A I'm not sure.

18 Q Do you recall telling them that you did not see who shot
19 due to the number of people. The kitchen was well lit.
20 Niles stated everybody started to run out of the kitchen
21 towards the living room. Niles noticed everybody running
22 away from Slim who is now standing by himself.

23 A Is that in this exhibit?

24 Q No, I'm asking if you remember ever telling that to the
25 police?

1 A Not that I can recall. I remember telling them everybody
2 was running out of the kitchen, yes, after the gunshot.
3 Q I'm going to show you what's been marked as Exhibit 37.
4 You recognize it?
5 A Yes, I do.
6 Q Did you read it yesterday?
7 A Yes, I did, I skimmed through it.
8 Q I'm sorry?
9 A Yes.
10 Q You skimmed through it?
11 A I read it, yes.
12 Q Okay. Is that your signature on the -- about the fifth
13 line down after the part about them reading you your
14 rights?
15 A Yes.
16 Q And is -- are those your initials at the bottom of that
17 first page, O.N.?
18 A Correct.
19 Q And is that your signature at the end of the document
20 after the words is true and correct?
21 A Yes.
22 Q Why did you sign it?
23 A 'Cause this is what I told them somewhat and I wanted to
24 get out of the interrogation room.
25 Q You wanted to get out of the interrogation room?

1 A Yes.

2 Q So you --

3 A In order to do that you got to comply with what they are
4 asking you and what they are telling you.

5 Q You couldn't possibly not sign it. Is that what you are
6 saying?

7 A I probably could have not signed it, but it would have
8 been more to that.

9 Q In what way?

10 A By the detectives harassing me.

11 Q Harassing you?

12 A Yes.

13 Q In what way?

14 A I had one detective tell me that he'll mess with me for
15 the rest of my life.

16 Q If what, if you didn't tell him the truth?

17 A Something to that effect. If I keep playing games or
18 something like that.

19 Q In this particular statement in that first paragraph on
20 Page 1 of 2 there you talk about it a little bit
21 differently. Correct?

22 A Page 1 of 2?

23 Q You state that after Slim took your necklace from around
24 your neck and threw it back on the kitchen table, Slim
25 walked across the kitchen to confront Rock. And again

1 this statement was given on February 5th starting around
2 9:15 p.m. Correct?

3 A Correct.

4 Q So Slim actually goes to confront Rock and really not the
5 other way around at least as you told it to the police
6 then?

7 A No, after they told him to calm down.

8 Q After they told him to calm down, Slim walked across the
9 kitchen to confront Rock?

10 A Something to that. I didn't -- I don't really get what
11 you are trying to say.

12 Q Well, you -- in other words, you and Slim are over here.
13 On Exhibit No. 1 you and Slim are over on the what would
14 be the left side of this kitchen table. Right?

15 A Right.

16 Q Rock and Vato come in. Where do they go? They just stay
17 here at the entrance way sort of between the living room
18 and the kitchen or do they come over by Mr. Wilber and
19 you?

20 A I don't remember, but at some point they told him to calm
21 down.

22 Q And that's --

23 A That's like me telling you to calm down from way over
24 there. If I'm right here telling you to calm down from
25 over there, I don't think that goes.

1 Q Okay. And you -- what do you mean you don't think it
2 goes?
3 A I would probably have to approach you and tell you to calm
4 down.
5 Q And if not, then you are going to go come by me?
6 A I probably would have did that from the get-go.
7 Q Slim walked across the kitchen to confront Rock who had
8 told Slim to chill out. Niles stated when Slim took his
9 necklace, he meaning Niles was sitting at the kitchen
10 table by the bathroom and refrigerator and Slim walked
11 across the kitchen by the stove. Is that right?
12 A Yes.
13 Q Is that what happened?
14 A That they came in to confront him.
15 Q Were you sitting at the kitchen table by the bathroom?
16 A Who, me?
17 Q Yeah.
18 A I might have been standing by the kitchen table by the
19 bathroom.
20 Q Did Slim then walk across the kitchen by the stove?
21 A I don't remember. I don't know how they met up like that.
22 Q What I mean is Rock is standing there telling him to chill
23 out?
24 A Right.
25 Q And his response is that he goes over by him, he's not

1 going to take that -- as you said, you are not going to
2 take it. Right?

3 A I didn't --

4 Q Mr. Wilber didn't like being told to chill out. Did he?

5 A I don't know.

6 Q He did something about it though. Right?

7 A I don't know. He didn't do anything about it. They all
8 did something about it.

9 Q Did you tell the police that when the tussle started, two
10 to three people from the living room, maybe more, came
11 into the kitchen and tried to separate everybody and calm
12 everybody down?

13 A Right.

14 Q Niles stated he does not know who the people were that
15 came into the kitchen from the living room other than they
16 were males. There were two females in the kitchen,
17 Endalia who you were talking to and Slim's sister,
18 Antonia?

19 A Correct.

20 Q Niles stated he then heard a gunshot come from the area
21 where the tussle was. Is that what you told the police,
22 sir?

23 A It says right here. At the time I think I did.

24 Q But now a year later you think you remember it a little
25 differently?

1 A No, I just wanted to get out the interrogation room.

2 Q So you A, lied to them or B, told them the truth to get

3 out of the interrogation room. Which was it?

4 A I told them what they wanted to hear. That's what they

5 wanted to hear. They kept telling me that I heard the

6 gunshot from that area.

7 Q You told them what they wanted to hear?

8 A I told them what they wanted to hear and they wrote it

9 down how they wanted to write it down.

10 Q Whether it was true or not, you were going to say whatever

11 you thought was in your best interests?

12 A Correct, I was gonna be here regardless.

13 Q And but my point is that you are the kind of guy who if

14 it's in your best interests, you will say whatever it is

15 you've got to say if you think it's in your best

16 interests, you don't care if somebody is dead, you don't

17 care if somebody is charged with a homicide, you don't

18 care --

19 A Incorrect.

20 Q Okay.

21 A Incorrect.

22 Q So you are in this room with the police, you saw a guy get

23 shot, you saw him fall to the ground, right, you ran over

24 his body to get out of the house.

25 A I didn't see him get shot.

1 Q Well, you were in the house when he got shot?

2 A Correct.

3 Q You know that the police are thinking Danny Wilber did it?

4 A I don't know who they were thinking.

5 Q They didn't tell you that?

6 A They were telling me we know you seen who did it, that's

7 what the detectives were telling me.

8 Q And so what the police wanted you to tell them was what?

9 A The police wanted me to tell them that I seen this man do

10 something.

11 Q Danny Wilber?

12 A Yes.

13 Q So you knew the police wanted you to say Danny Wilber was

14 the guy?

15 A To some extent.

16 Q So why didn't you tell them that? You were going to tell

17 them whatever they wanted to hear. Whatever it was they

18 wanted to hear, you were going to tell them so you could

19 get out that room.

20 A That's putting someone else's life in jeopardy that don't

21 got nothing to do with it, that's what I'm saying, it's a

22 difference.

23 Q So you wouldn't tell the police that you heard a gunshot

24 come from the area where the tussle was unless it was

25 true. Is that right?

1 A No, 'cause I just told you I didn't tell them what was
2 true.

3 Q Do you even know the difference between the truth and a
4 lie?

5 A Yes, I do.

6 Q Okay. What's the truth?

7 A The truth is telling the truth, what I seen and what I
8 didn't see.

9 Q Okay. And when you told the police can it be also the
10 truth what you heard?

11 A If I heard something and I told them and I really did hear
12 it, then, yeah, that would be called telling the truth.

13 Q Did you hear a gunshot come from the area where the tussle
14 was?

15 A I don't know where the gunshot came from.

16 Q Did you tell the police on February 5th, 2004,
17 approximately five days after the shooting, that you had
18 heard a gunshot come from the area where the tussle was?

19 A No, I didn't.

20 Q The police made this up?

21 A No, they didn't. They put it in their own words.

22 Q Okay. What words did you say?

23 A I said I think I heard the gunshot come from there.

24 Q Okay. So you think you heard the gunshot --

25 A I don't know where the gunshot came from.

1 Q Right, I understand now that you don't know where the
2 gunshot came from. On February 5th --
3 A I didn't know where the gunshot came from.
4 Q But you thought it came from the area where the tussle
5 was?
6 A It came from somewhere in the kitchen or somewhere around
7 the perimeter, that's where the guy got killed.
8 Q But you did not see who shot due to the number of people?
9 A No, I didn't.
10 Q Is that what you told the police?
11 A Correct.
12 Q And you couldn't see who shot because of the number of
13 people where?
14 A In the kitchen.
15 Q In the tussle?
16 A I said I did not see who had a gun or did not see anyone
17 shoot in the kitchen.
18 Q The kitchen was well lit though. Right?
19 A Correct.
20 Q Did you tell the police that or they just wanted to hear
21 that from you so you told them it was?
22 A I told them that the kitchen was well lit. They would ask
23 me was the kitchen well lit? Yes.
24 Q Did they ask you did you hear the gunshot come from the
25 tussle and you said yes?

1 A I can't recall that. I don't remember exact words what
2 they asked me. Even from reading this, I couldn't tell
3 you the exact words what they asked me.

4 Q Did you tell the police that everybody started to run out
5 of the kitchen towards the living room?

6 A Yes, I did.

7 Q Did you tell them that you noticed everybody running away
8 from Slim?

9 A Everyone running out of the kitchen.

10 Q Away from Slim?

11 A No, he wasn't chasing no one.

12 Q Who was now standing by himself. Did you tell them that,
13 sir?

14 A Tell them what?

15 Q That Slim was now standing by himself as everybody ran out
16 of the kitchen?

17 A Probably.

18 Q So in other words, everybody ran out of the kitchen
19 because there's been a gunshot and it's time to get out of
20 there 'cause you might get shot?

21 A Right.

22 Q The one guy that didn't do that right away as you recall
23 was Mr. Wilber?

24 A He checked himself.

25 Q He checked himself?

1 A Correct.

2 Q That's not in there though. You didn't tell the police
3 that that night -- did you -- that's new?

4 A No, I didn't think they asked me that. They were asking
5 me questions and wanted me to answer them how they wanted
6 me to answer them.

7 Q Well, Mr. Niles, you are not a dumb guy. You just said 5
8 minutes ago the police wanted you to say Danny Wilber did
9 this. Did you tell them, no way Danny Wilber did it, he's
10 patting himself down, he's thinking he got shot, I see his
11 hands as he pats himself down, he had no gun, you guys are
12 crazy. You didn't tell them that. You said everybody ran
13 away from him as he stood there by himself.

14 A I did tell them that. I did tell them that. They didn't
15 write it down. I'm not saying I didn't tell them that.
16 They didn't write down everything we discussed in that
17 little room.

18 Q Did you run away?

19 A Yes, I did.

20 Q Why?

21 A 'Cause I didn't want to be in here. I didn't want to be
22 no where around there.

23 Q Were you afraid you were going to get shot?

24 A No, I just didn't want nothing to do with it.

25 Q Niles also noticed somebody laying on the kitchen floor

1 about 7 feet away from Slim.

2 A If that's how many feet that they wrote down.

3 Q Is that what you told them? You think they just picked

4 that number out of a hat?

5 A No, they probably said what was it, 5, 6, 7 feet.

6 Q And you as a truth teller said?

7 A 7 feet probably.

8 Q In order to tell them the truth or to lie to them?

9 A In order to give them a statement so I could get out of

10 the interrogation room.

11 Q Did you tell the police that you did not know who was

12 lying on the kitchen floor and did not see this person

13 bleeding?

14 A I can't remember. I have -- I would have to read this

15 over.

16 Q Go ahead, take your time. Did you tell the police that?

17 A Right here in my statement it says standing by himself

18 Niles also noticed someone laying on the kitchen floor

19 about 7 feet away from Slim. Niles did not know who was

20 laying on the kitchen floor and did not see this person

21 bleeding. Niles did not see Slim with a gun.

22 Q Right. I'm only at the part -- or stop at the bleeding.

23 The next sentence will be did you tell them you didn't see

24 Slim with a gun?

25 A Yes, I did tell them that.

1 Q Okay. So that part you did tell them?

2 A Correct.

3 Q Okay. So you managed --

4 A And I'm not voluntarily telling these people this. They
5 are asking me questions and I'm pretty sure you are quite
6 familiar with that.

7 Q So why didn't you --

8 THE COURT: Stop. Mr. Niles, do you recall
9 my conversation with you earlier?

10 THE WITNESS: Yes, I do, Your Honor.

11 THE COURT: Adhere to it, please. You may
12 continue.

13 Q Why didn't you want to tell them?

14 A Why didn't I want to tell them what?

15 Q That Slim didn't do this, you hadn't seen Slim with a gun,
16 here's the deal, guys, here's what happened, boom, boom,
17 boom, boom, boom?

18 A I did tell them I didn't see Slim with the gun.

19 Q See, Mr. Niles, what I don't understand is you seem to
20 want to say you told the police these things, and that the
21 police had things they wanted to hear, and that they are
22 just asking questions and you are answering them or they
23 are giving you multiple choices and you are picking one.
24 So what happened in there with the police? Were you
25 giving them information or were they giving you the

1 information?

2 A 50/50.

3 Q 50/50. What information did the police give you?

4 A They are asking me questions --

5 Q Like what?

6 A -- and they are giving me choices of the answers, what --

7 what would probably best fit that question.

8 Q So they would ask you a question like: Mr. Niles, did you

9 see the person bleeding? (a) yes, (b) no, and you would

10 say, huh, (b) no?

11 A They didn't say it like that.

12 Q Oh, how did they say it?

13 A I don't know how I could put it to you.

14 Q Put it to me the way they put it to you.

15 A So did you -- did you see this man do this, did you -- did

16 you see him do this, did you run out, you know.

17 Q Well, what was it that the police said to you that got you

18 to say to them I noticed everybody running away from Slim

19 who was now at that point standing by himself? What was

20 it they said to you that got you to say that?

21 A I can't remember. It was about a year ago. I don't

22 remember the exact same words. This is the only thing I

23 remember what's on this paper.

24 Q And you signed it -- strike that. Did the police go back

25 through it with you at the end? Did they read it to you?

1 A Not that I can remember.

2 Q But it's possible?

3 A It's possible.

4 Q And at the very bottom where it says this statement was

5 read back to Niles by Detective Caballero in the presence

6 of Detective Corbett and is true and correct and then

7 there's an X and your signature. You see where I'm

8 talking about at the very bottom?

9 A Yes, I do.

10 Q You signed that because it was true and correct?

11 A No, because it was midnight and I was tired. I been in

12 this interrogation room for a few days now.

13 Q So when you signed your name after the words is true and

14 correct, did you -- did you know why you were signing it?

15 A Yes.

16 Q Why?

17 A To get out of there.

18 Q Well, I mean when you see a person's signature on a line

19 after it reads the statement is true and correct, what do

20 you think that means?

21 A That everything I said here is true and correct.

22 Q But it wasn't?

23 A No, it wasn't.

24 Q Did they give you the bathroom break from 12:26 to

25 12:37 -- or 12:31?

1 A It was declined.

2 Q No, the bathroom break.

3 A It was declined.

4 Q What about coffee, water and soda but declined, did they

5 offer you coffee, water or soda?

6 A But I declined it.

7 Q And what about the bathroom break from 12:26 to 12:31 or

8 was that their bathroom break?

9 A I don't think I took a bathroom break.

10 Q Did they or -- I mean they might have?

11 A They might have. They took a lot of breaks.

12 Q Okay. So which part of this last document is not true?

13 A There's little pieces and fragments that I see that aren't

14 true.

15 Q Like pick one just so I have an example of what it is you

16 are talking about.

17 A All right. Niles noticed everyone running away from Slim

18 who was now standing by himself, and when I said that, I

19 meant everybody as in the people he was fighting with,

20 along with everybody, Rock, Vato --

21 Q And ran the hell out of there?

22 A Yeah, everyone, even -- even -- and this is their buddy

23 that just got killed. Everyone ran.

24 Q And this is their buddy that just got killed?

25 A Right. Everyone ran.

1 Q God, they must be running from the gunman. Huh?

2 A Everyone ran.

3 Q Except Mr. Pat Down, Danny Wilber. Right?

4 A No, he ran after he checked himself.

5 Q After he checked himself. And you stuck around to see

6 that?

7 A No, I didn't. It just happened right away.

8 Q So the first thing that happened was everybody is running

9 out including you except Danny Wilber who is taking the

10 time to pat himself down. Is that it? That's the way it

11 really happened?

12 A When the gunshot went off, yes.

13 Q I'm going to show you one more photo, Mr. Niles, Exhibit

14 No. 20. Do you recognize that guy?

15 A Yes, I do.

16 Q Who is that?

17 A Isaiah.

18 Q And was he there?

19 A Yes, he was.

20 Q Was he in the kitchen?

21 A No, I didn't see him in the kitchen.

22 Q Ever?

23 A Ever.

24 Q At the after-set?

25 A I didn't see him in the kitchen.

1 Q Okay. Can you hand me your statements at well.

2 MR. GRIFFIN: Judge, I'm going to ask -- I
3 don't know if you want me to mark it separately from the
4 statement, but that the jury be allowed to see the last
5 page here of Exhibit 36. I could separate it and mark it
6 36-A, but I'm going to move 36 into evidence. And at this
7 time I don't think the jurors need to read the whole
8 statement, but --

9 THE COURT: Let's have it marked as 36-A.
10 That's the last page of Exhibit 36 and it is a -- it
11 purports to be a diagram.

12 MR. GRIFFIN: Yes.

13 MR. CHERNIN: Is that the diagram that
14 is --

15 THE COURT: Show that to defense counsel.

16 MR. CHERNIN: Thank you.

17 THE COURT: Are you asking the Court to
18 receive Exhibit 36-A into the record at this time?

19 MR. GRIFFIN: Yes, and I will remark the
20 remaining three pages as Exhibit 36.

21 THE COURT: Does the defense have any
22 objection to the Court receiving 36-A into the record?

23 MR. CHERNIN: No, Your Honor.

24 THE COURT: The Court will receive 36-A at
25 this time.

1 MR. GRIFFIN: And I ask that it be
2 published.

3 THE COURT: Publish it to the jury.

4 MR. GRIFFIN: And I have nothing further --
5 oh, strike that, I have one more question.

6 THE COURT: Wait until the jury has
7 reviewed the document. It has been published. You
8 indicated you had another question, Mr. Griffin?

9 Q Mr. Niles, have you ever been adjudicated delinquent of a
10 crime as a juvenile?

11 A Yes.

12 Q How many times?

13 A Four.

14 Q Have you ever been convicted of a crime as an adult?

15 A Yes.

16 Q How many times?

17 A Three.

18 MR. GRIFFIN: Nothing further.

19 THE COURT: Cross.

20 CROSS EXAMINATION BY MR. CHERNIN:

21 Q There came a point in time after the shooting when you
22 were taken into custody. Is that a fair statement?

23 A Correct.

24 Q When I say taken into custody, what does that mean to you?

25 A Taken, getting arrested.

1 Q And that happened to you several days after the
2 shooting --
3 A Correct.
4 Q -- on January 31st. Correct?
5 A Yes.
6 Q Who took you into custody?
7 A Well, the first time they came to my house and left me a
8 card. When I got home, I returned their phone call, went
9 down voluntarily to go talk to them, and then they let me
10 go, and after that they kept coming to my house and -- and
11 then I don't know the arresting officer though.
12 Q Were you actually booked into the jail as part of this
13 investigation?
14 A I don't think so.
15 Q Okay. Did you understand that you were free to leave when
16 those police officers were talking to you even the first
17 time?
18 A No, I didn't. I wasn't aware of that.
19 Q At that time did you know whether you were merely a
20 witness in this matter or if you were the person who they
21 may be interested as being a participant in a homicide?
22 A I didn't know.
23 Q Was that -- no one made that clear to you?
24 A No one made that clear to me.
25 Q And isn't it true that on the 5th day of February -- I'm

1 sorry -- the 4th day of February, 2004, you were taken
2 into an interview room at approximately 7 o'clock --
3 precisely at 7:07 p.m. Do you have any reason to dispute
4 that it was 7:07 p.m.?

5 MR. GRIFFIN: I will stipulate.

6 Q And that you left that interview room at 11:48 p.m. Would
7 you agree that that sounds about right, that sounds
8 correct? You said it was about midnight.

9 A Yeah.

10 Q So about quarter to -- well, 11:48 p.m. is about midnight.
11 Right?

12 A Yes.

13 Q So you were interviewed for a total of 4 hours and 41
14 minutes. Correct?

15 A Correct.

16 Q And then the next day at -- isn't it true that on February
17 5th of 2004 you were again in the same interview room with
18 different detectives. Isn't that correct?

19 A Yes.

20 Q And this is in the afternoon. Now did you come in
21 voluntarily that time or did the police come get you? How
22 did you end up in the same interview room at the Criminal
23 Investigation Bureau on February 5th of 2004?

24 A They never let me leave.

25 Q So you remained in custody from February -- or you were --

1 from February 4th of 2004 from 7 o'clock until 11:48 they
2 took you to a room and offered you a bathroom break at
3 10:06 p.m. So for 3 and a half -- or 3 hours was the
4 first time they offered you a break. Right?

5 A Correct.

6 MR. GRIFFIN: Well, I'm going to object.
7 Mr. Chernin is pretty much testifying and then trying to
8 throw in a question at the end. He was not in custody,
9 that's inaccurate.

10 THE COURT: Are you objecting to the form
11 of the question?

12 MR. GRIFFIN: I'm objecting.

13 THE COURT: Sustained. Rephrase.

14 Q Well, did you perceive yourself as being free to leave?

15 A No.

16 Q Did the police tell you you were free to leave?

17 A No.

18 Q And you remained -- where -- if you weren't -- if you
19 never left, where did you stay?

20 A In a little holding cell.

21 Q So even -- was -- was this little holding cell that you
22 were in, were there bars there?

23 A Yes.

24 Q Did you have a key to those -- that door so that you could
25 leave?

1 A No.

2 Q Were you offered a shower?

3 A No.

4 Q Were you offered some food or only -- were you offered

5 food while you were in that little holding area?

6 A Coffee, soda and cigarettes and I declined.

7 Q What about -- what about food?

8 A No.

9 Q Were you offered a bologna sandwich?

10 A No.

11 Q So you were held -- if it's not in custody, you were

12 held -- if Mr. Griffin doesn't agree that's custody -- you

13 were held and then you came -- and then somebody came to

14 see you -- it's midnight -- roughly midnight and you are

15 placed into this holding cell. Right?

16 A Yes.

17 Q Is that correct? And then the next day in the afternoon

18 about 2:30 in the afternoon some other detectives come in

19 to see you. Is that correct?

20 A Yes.

21 Q And do they bring you food?

22 A No.

23 Q Do they bring you water?

24 A No.

25 Q Do they offer you a shower?

1 A No.

2 Q And they talk to you for -- from 2:30 until approximately
3 4:11 p.m. Correct?

4 A Correct. Not exactly all that time. They would walk out
5 for like 15 minutes, send another group of detectives in,
6 walk out for about 15 minutes, when they were done, send
7 another group in.

8 Q Well, when these guys were coming in and out, were they
9 offering you food?

10 A No.

11 Q Water?

12 A Soda, coffee. No water I don't think -- well, that has to
13 do with soda or coffee, but I declined that.

14 Q Then you talked to them for an hour and 41 minutes and
15 then later that night -- well, first of all, after that
16 4:11 p.m., where did you go then? Were you -- did you
17 perceive yourself as being in custody?

18 A I thought I was.

19 Q And were you placed -- where did they take you? Did they
20 take you to the jail, did they take you to Mr. Griffin's
21 house, where did they take you?

22 A No, they keep taking me to a room with bars and then I --
23 from there I would go to a little investigation room with
24 just four solid walls. When they were done there, they
25 said, okay, you are not telling us what we need to hear,

1 put him back in his cell. So they take me back to the
2 cell, put me back in the cell.

3 Q And so about 5 -- roughly about 5 hours later because
4 their interview, Exhibit 37 -- I'm sorry, Exhibit 37,
5 which is one of the documents that Mr. Griffin showed you,
6 shows you -- shows you were taken in again at they say
7 9:13 p.m., correct, and then it shows that you were in an
8 interrogation room until 1:35 in the morning. Is that
9 correct?

10 A Correct.

11 Q Now what happened to you -- oh, by the way, did anyone
12 allow you a telephone call?

13 A No telephone call.

14 Q Did anyone in the world know where you were?

15 A Probably my mother and that was because the first day I
16 went down there voluntarily.

17 Q So did you regard this as like a friendly confrontation
18 with the police?

19 A No, because my mom said she had been calling and no one
20 knew where I was.

21 Q Now during that time you were held without communication
22 to the outside world. Is that a fair statement?

23 A Yes.

24 Q During that time you then are brought back for a third
25 interview at 9:13 on February 5th. Is that correct? Now

1 between --

2 A Correct.

3 Q And between that second and third interview were you

4 offered a shower?

5 A No.

6 Q Were you offered food?

7 A No.

8 Q But you were offered cigarettes?

9 A Yes, and I don't smoke.

10 Q And you were offered soda. And do you drink soda?

11 A Not that much. Try not to. Juice and water.

12 Q Now during that period of time for another 4 hours they

13 write down two pages of stuff. Is that correct?

14 A Correct.

15 Q And did you perceive them as being friendly, were they

16 trying to break your spirit, what were they trying to do?

17 Did you think that these were people that you could rely

18 on to tell your message to the outside world?

19 A No.

20 Q Who was in control of these interviews, was it you or was

21 it the police officers? Who was it? Who was in control?

22 A The detectives.

23 Q And who is writing on those -- other than where you may

24 have put your initials or your name in a couple places on

25 those three exhibits, who was writing down the words that

1 were there?

2 A Detectives.

3 Q Have you ever heard of an audio tape or -- and a tape

4 recorder?

5 A Yes.

6 Q Or a videotape --

7 A Yes.

8 Q -- and a video recorder? Were any of those things brought

9 into the interview room with you?

10 A No.

11 Q Now, Mr. -- now all you knew was that there was a dead

12 man. Right?

13 A Yes.

14 Q And Mr. Griffin asked you a whole bunch of questions about

15 when you lied and when you were telling the truth. Right?

16 A Correct.

17 Q Now at the time you were talking to these detectives, did

18 the detective tell you, hey -- and first of all, do the

19 people call you Oscar or Mr. Niles or Jay? What were

20 these police officers calling you?

21 A Jay.

22 Q And why were they calling you Jay?

23 A Because that's a nickname.

24 Q For junior?

25 A Yeah.

1 Q Okay. Now, Mr. Niles, one of the last things that you
2 told Mr. Griffin was that the last person that you saw as
3 you left the kitchen was the person you call Slim. Right?

4 A Correct.

5 Q And Slim is Danny Wilber?

6 A Correct.

7 Q And Danny Wilber is the man that's been sitting next to me
8 at counsel table --

9 A Right.

10 Q -- this time? Now, during that period of time -- was
11 this a long period of time before you ran out after you
12 heard the shot or was it a very short period of time?

13 A Very short period, right away, everybody.

14 Q And the person who was closest to the shot, other than the
15 person who dropped over, you perceived to be Mr. Wilber.
16 Correct?

17 A Wilber, correct.

18 Q Now was there ever a period of time that Danny Wilber was
19 behind David Diaz --

20 A No.

21 Q -- the person whose dead? Did you know this man to be
22 named David Diaz by the way? You didn't know his name?

23 A No.

24 Q There's -- in Exhibit 15 and Exhibit 14 there is some --
25 there's a body lying on the floor. Does that appear to be

1 what you -- other than the pool of blood, does that appear
2 to be what you saw in the kitchen at 1128 West Mineral
3 Street on January 31st of 2004?

4 A Yes, but without all the blood.

5 Q Okay. And so somebody was at least lying there on the
6 floor. Correct?

7 A Correct.

8 Q And what appears to be in this diagram, would you agree
9 that this is -- there's a table there?

10 A Auh-hum.

11 Q And does this appear to be -- and I'm pointing and I'm
12 going to ask you to hold this and I'm going to point to
13 something with the pointer when I find it, but I will use
14 a pen. This -- pull it back so you can see it as well.
15 This item back here with the knobs and the dials, does
16 that appear to be the stove?

17 A Yes.

18 Q So when you talk about the stove area and you -- and you
19 drew a diagram, Exhibit 38-A --

20 THE COURT: Do you mean 36-A?

21 MR. CHERNIN: 36-A. Thank you, Judge.

22 Q 36-A, when you talk about the stove area that you see in
23 Exhibit 15, the tussle was going on in this area between
24 this part of the doorframe and the stove. Is that a fair
25 statement?

1 A Correct.

2 Q And while the tussle was going on, there was not a body
3 lying on the floor. Was there?

4 A No.

5 Q And so when you say 7 feet away, that's an estimate or was
6 that what the police used as an estimate?

7 A They used about 5, 6, 7.

8 Q Feet?

9 A Right, which I --

10 Q And when -- when the police were interviewing you, you
11 didn't have the opportunity to have a picture like Exhibit
12 15. Did you?

13 A No.

14 Q And you didn't even have -- you had this rough diagram,
15 exhibit -- what was your 36-A. Right?

16 A Right.

17 Q And that's what you had available to you. Right?

18 A Right.

19 Q Now, you continue to hold Exhibit 15 and that's okay. Now
20 Mr. Diaz, when you say he was near this group that was
21 struggling, was this -- were these guys just standing
22 still and pushing one another or were they moving around?

23 A They were moving around.

24 Q They were moving around?

25 A Correct.

1 Q And was Rock closer to the wall or closer to the table?

2 A Closer to the table like more or less right here.

3 Q And where was Danny?

4 A Over here.

5 Q And where was Richard Torres, Vato?

6 A Kind of right here too.

7 Q Okay. Now the table seems to be moved -- or appears to be

8 close to that wall. Is that -- is that just a perception

9 of depth on that diagram or was it moved in some way? How

10 did -- or is that how it looked to you?

11 A From this picture here it looks to be pushed back a little

12 bit more.

13 Q More than it was on that night?

14 A Right, and it was more this way like centered in the

15 middle, you know.

16 Q Would Exhibit 14 more accurately depict where you recall

17 the table being?

18 A Right.

19 Q Was Danny Wilber -- you see some cabinets in that

20 photograph?

21 A Yes, I do.

22 Q And by that photograph, I'm talking about Exhibit 14, the

23 one that's in front right now -- which one -- I'm sorry,

24 either 14 or 15?

25 A Exhibit 14.

1 Q Which one shows it better from your perspective? We will
2 talk from which one you choose.

3 A 14.

4 Q 14. You are looking at Exhibit 14. And you see some
5 cabinets -- kitchen cabinets?

6 A Correct.

7 Q Now was Danny Wilber standing next to those cabinets when
8 you saw the gun or -- I'm sorry -- when you heard the
9 gunshot go off, where did you see Wilber?

10 A Somewhere over here.

11 Q When you looked up over there?

12 A Right.

13 Q So it would have been to the west -- I'm sorry -- to the
14 north -- it would have been -- well, let's use -- use that
15 diagram. More towards those curtains. Right?

16 A Right.

17 Q So he would have been towards the curtains, not behind
18 Diaz. Correct?

19 A Not behind Diaz.

20 Q Diaz was away from the curtains and closer to the
21 cabinets?

22 A Right.

23 Q And you are pointing to an area on Exhibit 14 near it
24 might be a slow pressure cooker or a bread maker or
25 something. It's a -- some -- some sort of kitchen utensil

1 or cooking device is on that counter. Right?

2 A Correct.

3 Q And so he was closer to that. And so when you see -- on

4 Exhibit 15, the next one, when you see from that

5 perspective where Mr. Diaz is lying, does that adequately

6 depict the view that you had when you first saw Mr. Diaz

7 hit the floor?

8 A Yes.

9 Q So that his feet would have been behind the cabinet area?

10 A Correct.

11 Q And he fell forward?

12 A Forward.

13 Q So he would have fallen toward Danny Wilber. Is that

14 correct?

15 A Correct.

16 Q I'm sorry, you don't have to hold those any longer. I can

17 put those down for you.

18 A My arm was getting tiered.

19 Q I know, I can see that. I appreciate it. Now during the

20 time that the police were questioning you, did you say to

21 them, hey, look, let me just write down everything that

22 happened or did they give you the opportunity even to

23 write it down?

24 A No.

25 Q Mr. Griffin asked you if you know the difference between a

1 truth and a lie. Did the police have the entire truth in
2 what they wrote down?

3 A No.

4 Q And did you want to come -- did you think you would ever
5 have an opportunity to come and tell the truth to someone?

6 A Yes.

7 Q Who did you think you would have an opportunity to tell
8 the truth to?

9 A Everyone in this courtroom. Why I gave the statement that
10 time was to get out of there then and there. I knew it
11 wasn't going to be over.

12 Q Now, what happened -- after 11 -- at 1:35 p.m. after this
13 last statement, Exhibit 37, did the police let you go
14 then?

15 A Yes.

16 Q Did they drive you home?

17 A No.

18 Q So you had been according to your -- your thinking, even
19 if Mr. Griffin says you weren't in custody, you had been
20 in constant police contact contained in a -- in a room
21 with cell -- with cell bars from the day before when you
22 had voluntarily appeared at about 7 o'clock at night until
23 3 hours later. Is that fair to say?

24 A Yes.

25 MR. CHERNIN: Thank you.

1 THE COURT: Are you going to have redirect?

2 MR. GRIFFIN: Yes.

3 THE COURT: We are going to take our
4 afternoon break, ladies and gentlemen. We will be back on
5 the record at 10 minutes after the hour of 4.

6 (The following proceedings were held
7 outside the presence of the jury.)

8 THE COURT: Mr. Niles, you may step down.
9 I remind you, you remain under oath and you will return to
10 the witness stand at 10 minutes after the hour of 4.

11 THE WITNESS: Thanks.

12 (Whereupon, a recess was had at 3:59 PM.)

13 (The following proceedings were held in the
14 presence of the jury.)

15 (Witness Oscar Niles resumes the stand.)

16 THE COURT: You may begin your redirect.

17 MR. CHERNIN: Do we have a ruling on that?

18 THE COURT: I will have a sidebar with the
19 lawyers.

20 (Whereupon, an off the record discussion
21 was had.)

22 THE COURT: You may begin your redirect.

23 REDIRECT EXAMINATION BY MR. GRIFFIN:

24 Q Mr. Niles, this is Exhibit 41. That's another statement
25 that the police took from you -- not about this homicide,

1 the one that Danny Wilber is charged with, but about
2 another one, right, that they talked to you about when you
3 were down here back in February of last year?

4 A Correct.

5 Q The one you -- okay. And how many pages is that?

6 A Three.

7 Q Did you sign it?

8 A Yes, I did.

9 Q Is that one also full of stuff that's left out and stuff
10 the police didn't put in right and all that kind of stuff?

11 A No, because this one was took after all these were took.

12 Q So that one -- the one not about Danny Wilber, the guy on
13 trial, where you told them you didn't know anything about
14 that other homicide, that's all correct?

15 A Correct. This is the one I gave first, this is the last
16 one, that's probably why they waited last to talk to me
17 about this one.

18 Q So that they could get it all right finally?

19 A I don't know why. I couldn't tell you that.

20 Q This is the homicide where the victim's name was Eugene
21 Pettis. Right?

22 A Correct.

23 Q It had nothing do with Danny Wilber or anything like that.
24 Part of the reason the police took longer with you was
25 because they were also talking to you and interviewing you

1 about this other homicide in case you had information
2 about that?

3 A What were the time frames on that one? Could you tell me
4 please.

5 Q 9:13 p.m. to 1:35 a.m.

6 A And what was the times on this, 9:13 to 1:35 a.m.?

7 Q Right. This is occurring at the same time. They just
8 document it separately because the homicides are separate.

9 A Right or did they just leave out the room a few times and
10 then come back in.

11 Q Well, in any event, from 9:15 to 1:35 you are talking to
12 them about two different homicides. Right?

13 A No, that one -- I think that one might have been short,
14 they just put that time frame down because they were
15 talking to me about this one.

16 Q The whole interview talking about both of them lasts --
17 you go into that interview room at 9:35, 9 -- excuse me --
18 9:13 p.m., you get out at 1:35 a.m., and during that time
19 they are talking to you about this homicide, meaning
20 Mr. Wilber, the homicide he's accused of, and this one
21 involving Eugene Pettis?

22 A I would say they talked to me about that one at about --
23 not to be exact, but I would say around 1:15 a.m.

24 Q So in 20 minutes you covered all this?

25 A Probably.

1 Q Including the --

2 A That was real brief. I didn't know anything about it.

3 Q Did they show you a photograph of Roberto Gonzalez and

4 Doug Kirsh and all that stuff?

5 A Yes, they did.

6 Q And you gave them all this information in 20 minutes?

7 A Yes, I did. I'm not saying it was exactly 20 minutes.

8 Q When you were -- when you first agreed to come down to the

9 police, you agree they came to your house and you agreed

10 to go down and talk to them?

11 A Correct.

12 Q And because you figured, well, they finally got me, I

13 might as well go down and tell them what I know. Right?

14 A This is the first time?

15 Q Yeah, when you first went down with the police on February

16 5th.

17 A No, I just went down there so they could stop coming to my

18 mom's house.

19 Q What did you think you were going down for?

20 A I knew what it was for.

21 Q What was it about?

22 A What had happened the night of the after-set. They wanted

23 to know some answers.

24 Q And so you figured I will go down there with them, I will

25 answer their questions, and that way they will stop

1 bugging me?

2 A Yes.

3 Q And so you sat down with those detectives and sure enough

4 you spent a number of hours lying to them?

5 A I wouldn't say not necessarily lying.

6 Q Well, you told them that you --

7 A There were some twists in there.

8 Q Some twists?

9 A Yes.

10 Q Okay. So as best you can, what's the difference between a

11 twist and a lie to Oscar Niles?

12 A What's the difference?

13 Q Yeah, what's the difference.

14 A Is that I didn't lie, I just rearranged some sentences.

15 Q Okay. So for example when you said I wasn't there when

16 the shooting happened, what you meant -- what you twisted

17 was I was there when the shooting happened?

18 A And I didn't want anything to do with the shooting.

19 Q Okay. And therefore you were willing to lie?

20 A I wouldn't say necessarily lie, like I said before.

21 Q Okay. You were willing to twist the truth to whatever you

22 wanted to get out of it?

23 A Yes.

24 Q Okay. And you know that lying to the police is a crime,

25 obstructing an officer. You ever heard that?

1 A Yes, I did.

2 Q Okay. And so in your mind at least you knew, huh, maybe

3 they are keeping me here because they know I just lied to

4 them and they know I committed a crime?

5 A No.

6 Q When you were in that jail which is with the bars on it,

7 didn't they serve you food up there? Isn't there a meal

8 schedule up there of breakfast, lunch and dinner?

9 A No.

10 Q No McDonald's at all?

11 A I didn't have any McDonald's.

12 Q Did they offer it to you?

13 A I'm not sure. I don't think so.

14 Q It's possible?

15 A I was probably asleep. They don't come in there and wake

16 you up, say excuse me, you want your food.

17 Q And at what point did you say I want some food?

18 A At no point.

19 Q Well, what point did you tell them, hey, can I get a

20 shower?

21 A At no point.

22 Q At what point did you say could I get some juice or water?

23 A At no point.

24 Q In fact, they were offering those things and you were

25 saying I don't want them?

1 A Correct. No, they were offering the water, yes, not the
2 shower and the food, but that's irrelevant right now.

3 Q You said that you preferred juice and water to soda?

4 A Pardon me? Yes.

5 Q But your favorite --

6 A I'm saying not there -- I'm not saying in the jail what
7 they are offering me, I'm just saying in general.

8 Q In general. But your favorite mixed drink is Hennessey
9 and Coke?

10 A Yes.

11 Q So you will drink the soda if it's mixed with the
12 Hennessey?

13 A Correct.

14 Q You knew when the police first came to get you that you
15 were just a possible witness to all of this. Correct?

16 A Correct.

17 Q Okay. So why the attitude?

18 A I didn't want to be a witness. I didn't want nothing to
19 do with it. It was terrifying.

20 Q Right, but at that point you are down in the police
21 station, you've agreed to go with them, I mean, why not
22 tell them what you know and get it over with?

23 A At that time I had so many things running through my mind.

24 Q What you told the police was that you didn't go in and
25 tell them right away what happened 'cause you were scared

1 for your family.

2 A Too many things running through my mind.

3 Q Too many things running through your mind?

4 A Too many thoughts running through my mind.

5 Q Like, man, am I gonna be the one that puts Danny down for
6 this?

7 A Not necessarily, no.

8 MR. GRIFFIN: Nothing further.

9 THE COURT: Recross?

10 RECROSS EXAMINATION BY MR. CHERNIN:

11 Q Mr. Niles, again you acknowledge that you didn't always
12 tell the truth to the police. Correct?

13 A Yes, I do.

14 Q And despite those untruths that you told, was there ever a
15 period in time when you saw Mr. Wilber behind Mr. Diaz
16 prior to or after you heard the gunshot in the kitchen at
17 1128 West Mineral Street on January 31st of 2004?

18 A No.

19 MR. CHERNIN: Thank you.

20 THE COURT: Anything further, Mr. Griffin?

21 MR. GRIFFIN: No.

22 THE COURT: You may step down.

23 (The witness leaves the stand.)

24 MR. GRIFFIN: I call Ms. Franceschetti.

25 THE WITNESS: Am I done?

1 THE COURT: Is either side expecting to
2 call -- or recall Mr. Niles to the witness stand?

3 MR. CHERNIN: I don't anticipate doing so.

4 THE COURT: Mr. Griffin?

5 MR. GRIFFIN: No, I'm not.

6 THE COURT: The defendant is released from
7 his subpoena.

8 MR. GRIFFIN: The witness?

9 THE COURT: I mean the witness is released
10 from his subpoena.

11 I'm going to have you come on up to the
12 witness stand. I'm going to have you remain standing.
13 I'm going to have you raise your right hand and my clerk
14 will swear you in.

15 LEA FRANCESCHETTI, being first duly sworn
16 on oath to tell the truth, the whole truth, and nothing
17 but the truth, testified as follows:

18 THE CLERK: Please be seated.

19 THE COURT: I'm going to have you pull that
20 chair directly into the bench in front of you. I'm going
21 to ask you to use the microphone, speak up real loud and
22 clear, and I want you to begin by stating your full name
23 for the record, spelling your first and last name.

24 THE WITNESS: Lea Marie Franceschetti,
25 L-E-A F-R-A-N-C-E-S-C-H-E-T-T-I.

1 THE COURT: You may begin.

2 DIRECT EXAMINATION BY MR. GRIFFIN:

3 Q Ma'am, you pronounce your last name Franceschetti?

4 A Franceschetti.

5 Q Franceschetti?

6 A Auh-huh.

7 Q Okay.

8 THE COURT: Is that a yes?

9 THE WITNESS: Yes.

10 THE COURT: One of the things we need you
11 to do is the court reporter who is seated in front of you
12 is taking every single thing down in the courtroom and she
13 needs to take down actual word responses as opposed to
14 verbal responses.

15 THE WITNESS: Okay.

16 THE COURT: So I need you to use yes or no
17 or a natural word response. Thank you. You may begin.

18 Q You are in some pain. Correct?

19 A Yes.

20 Q If you need anything, please let the Judge know, okay.

21 A Yes.

22 THE COURT: Do you want water to begin
23 with?

24 THE WITNESS: No, I'm fine.

25 THE COURT: Go ahead.

1 Q How old are you?

2 A 23.

3 Q How many kids do you have?

4 A I just had one.

5 Q About five days ago?

6 A Five days earlier.

7 Q And that's why you are hurting. Right?

8 A Yes.

9 Q Okay. But you are down here today because you got a

10 subpoena. Right?

11 A Yes.

12 Q And you know you are down here to talk about what happened

13 a little over a year ago on West Mineral. Correct?

14 A Yes.

15 Q Had you been at Bicardi's?

16 A Since?

17 Q No, before you went to that after-hours party.

18 A Yes.

19 Q Okay. Where is Bacardi's?

20 A 27th and Lincoln.

21 Q Before that day how many times had you been to Bicardi's

22 in your life if you remember?

23 A Like ten.

24 Q So you are familiar with that place?

25 A Yes.

1 Q When you were there, did you see a guy by the name of
2 Danny Wilber?

3 A I didn't really pay attention.

4 Q Did you -- did you see a guy there with the nickname Slim?

5 A No, I mean --

6 Q At Bicardi's I mean.

7 A Oh, well, not that I noticed, no.

8 Q Okay. How was it that you went from Bicardi's to that
9 after-hours party over on West Mineral?

10 A People were talking about a party and they asked us to go
11 with so we went.

12 Q Didn't the D.J. get on the microphone and say everybody at
13 Bicardi's, after-set at 1128 West Mineral or something
14 like that?

15 A Not that I remember.

16 Q Okay. Just word of mouth kind of thing?

17 A Yeah.

18 Q Okay. How much had you had to drink there at Bicardi's?

19 A Enough.

20 Q What's enough, I mean --

21 A I was -- I was intoxicated.

22 Q And what were you drinking if you recall?

23 A Well, probably Miller Lite and Jaeger Bombs.

24 Q And Jaeger bombs are Jaegermeister and Red Bull?

25 A Yes.

1 Q Do you remember, was -- did you go before the bar closed
2 over to that party or when the bar closed?
3 A When the bar closed.
4 Q So everybody that's --
5 A Yeah.
6 Q Okay. How did you get from Bicardi's over to the
7 after-set or the after-hours party?
8 A With my friend Jaimie.
9 Q Jaimie, what's her last name?
10 A Williams.
11 Q She's out in the hallway right now?
12 A Yes.
13 Q When you walked into that party or that house, what
14 happened?
15 A We were -- I was talking to people, we went -- I was in
16 the front room mostly the whole time with Tim, and Jaimie,
17 and Tony. I didn't really leave that room much so.
18 Q While you were there, did you have -- did you have to
19 begin with while you are in the house an unpleasant
20 experience with someone to put it --
21 A Yeah.
22 Q Who was that?
23 A Slim.
24 Q And do you see this guy -- that guy in court today?
25 A He looks different.

1 Q Right. But do you see him?

2 A I guess, yeah.

3 Q Okay. This guy that you knew as Slim, what happened --

4 THE COURT: One moment, Mr. Chernin -- I
5 mean, Mr. Griffin. You said I guess, yeah, and then you
6 said --

7 THE WITNESS: He looks -- I've only seen
8 him like twice in my whole life, so I don't really
9 remember what he looks like. I remember tall and black.

10 THE COURT: And you were pointing in what
11 direction just now?

12 THE WITNESS: The front.

13 THE COURT: And who were you pointing at?

14 THE WITNESS: Him.

15 THE COURT: Would you describe him by where
16 he's seated what he's wearing.

17 THE WITNESS: The striped shirt, blue,
18 brown.

19 THE COURT: Is that who you were indicating
20 to Mr. Griffin when he asked you that question?

21 THE WITNESS: Yes.

22 THE COURT: You may continue.

23 Q When you talked to the police shortly after this happened,
24 did they show you a photo of Mr. Wilber?

25 A Yes.

1 Q And you said this is the guy that I'm talking about that I
2 had this little confrontation -- altercation with him?
3 A Yes.
4 Q Okay. And how did that go? What happened exactly?
5 A He just said, bitch, I'll slap you and that was it.
6 Q To you?
7 A Yeah.
8 Q Bitch, I will slap you?
9 A Yeah.
10 Q Well, what had you said to him to get him to say that?
11 A I didn't say anything.
12 Q Well, did you give him a look?
13 A No, I was talking to some other guy, I had my back towards
14 him and he came up.
15 Q He came up to where you were. What were you doing at that
16 moment?
17 A Talking to some other person. I don't know --
18 Q Did you --
19 A -- exactly. He was a person at the party.
20 THE COURT: Okay. Mr. Griffin, I'm just
21 going to ask you to remember to let her finish her
22 response and then you can ask her the next question.
23 Q Did you give him the finger or anything?
24 A No, I kept my mouth shut.
25 Q Did you give him a look like buzz off before he said that?

1 A No. I looked at who I was talking to just like whatever.
2 I didn't understand where it was coming from.

3 Q Before or after Mr. Wilber said: Bitch, I will slap you,
4 did you do anything that you can think of now that might
5 have set him off?

6 A Not that I can think of, no.

7 Q How long were you there in the after-hours -- at the
8 after-set?

9 A Not -- maybe not even an hour. It wasn't too long.

10 Q What -- what made you leave?

11 A Some guy came up to us and told us to leave.

12 Q Do you remember who that guy was?

13 A I guess his name is Isaiah.

14 Q I'm going to show you a photograph marked Exhibit 20. Do
15 you recognize that guy?

16 A Yeah.

17 Q Who is that?

18 A That's the one that told us to leave, Isaiah.

19 MR. GRIFFIN: Isaiah Arroyo, A-R-R-O-Y-O,
20 for the record.

21 Q And do you know why he told -- when you say told us to
22 leave, you mean you and Jaimie?

23 A Yeah.

24 Q Do you know why he said that?

25 A No, I don't.

1 Q Do you recall him using the word drama?

2 A No.

3 Q Did you do that, did you leave?

4 A Yeah, we left right away.

5 Q And where did you go?

6 A To the car.

7 Q With Jaimie?

8 A With Jaimie.

9 Q And what happened next?

10 A We warmed up the vehicle, and we were sitting in there

11 warming up 'cause it was really cold out and all of a

12 sudden about a couple minutes later all these people got

13 in the car in the back seat.

14 Q Did you know who they were?

15 A Yes.

16 Q Who?

17 A It was Donald, Jay, and Antonia, and Donald's girl friend.

18 Q Did you know Antonia?

19 A I have -- I've -- yeah. Not too good. It was just like

20 on a -- how do you say that -- I have seen her around. I

21 don't talk to her on the phone or anything, I just see her

22 when we go out.

23 Q I'm going to show you a picture marked Exhibit 12. Do you

24 know who that is?

25 A That's Antonia.

1 Q The Antonia that got in the car that you were in shortly
2 after you left the after-set?

3 A Yes.

4 Q When you say Donald, do you know who that is in
5 relationship to Antonia?

6 A I think it's her cousin. I'm not really sure.

7 Q And Jay, did you see him here today?

8 A Yeah.

9 Q Do you know his real name?

10 A No. I think Jay.

11 Q I'm going to show you a picture marked Exhibit 22. Do you
12 recognize that guy?

13 A Auh-hum, that's Jay.

14 THE COURT: Is that a yes?

15 THE WITNESS: Yes. Sorry. Jay.

16 Q Who -- that's Jay. And then another woman in addition to
17 Antonia also got in the car?

18 A Yes.

19 Q So four people got in the car?

20 A Yes.

21 Q Had they gone there with you?

22 A Not in the same car, no.

23 Q Right. I mean had they traveled in the same car with you
24 and Jaimie from Bicardi's to the after-set?

25 A No.

1 Q Do you know how it is they picked that car to get into?

2 A I have no clue.

3 Q And what happened when they got in the car?

4 A They -- every -- they were all yelling saying get out of

5 here, just drive, just drive.

6 Q Do you recall Antonia saying anything else besides, you

7 know, just drive, just drive?

8 A Yeah, she was screaming in the back I can't believe he did

9 that, I can't believe he did that.

10 Q I can't believe he did that, I can't believe he did that?

11 A Yeah -- yes.

12 Q And do you recall anybody saying anything when she said

13 that?

14 A No.

15 Q What was her emotional state?

16 A She was crying.

17 Q What about the other woman?

18 A I don't think anything. I didn't really notice. I was on

19 my phone a lot though so I wasn't really paying attention.

20 Q Was she crying?

21 A The other female?

22 Q Yeah.

23 A I don't know. I don't think so, but I'm not sure.

24 Q Did you tell the police that by the way Antonia was crying

25 and speaking, that you thought someone had been shot in

1 the house?

2 A I would assume, I mean --

3 Q Well, at that time when it was happening, is that what you
4 thought?

5 A That's what I was thinking, yeah.

6 Q And did you tell the police that someone had been shot --
7 but you thought that someone had been shot back at the
8 house and that Antonia knew who shot person?

9 A I didn't know if she knew, but I -- it seemed like she
10 did.

11 Q It seemed to you like she knew?

12 A Yeah, but she never said that she knew.

13 Q But she never said the name the person --

14 A No.

15 Q -- or anything like that?

16 A No.

17 Q What was it that Antonia did in the car or was doing in
18 the car there that lead you to believe I think she knows
19 who did this?

20 A Yes.

21 Q What was it? What did she do?

22 A Just the way every -- the way she was yelling and the way
23 she was crying. Just her reactions.

24 Q Lead you to believe that Antonia knew who did the
25 shooting?

1 A Yes.

2 Q Do you recall Donald Jennings -- Donald -- the guy Donald
3 telling her to shut the fuck up? Do you recall that?

4 A Yeah -- yes.

5 Q You think so?

6 A Yes.

7 Q Okay. But when you talked -- do you remember when you
8 talked to the police you said you weren't sure that that
9 happened, but that if Jaimie Williams said it happened, it
10 probably did?

11 A I think so. I remember him yelling, but I'm not
12 exactly -- I wasn't like -- again, I wasn't really paying
13 attention. I was on the phone most of the time.

14 Q With who?

15 A With -- I was talking to Tony.

16 Q Is that Tony Valdez?

17 A Yes.

18 Q And the people in the car never talked about -- other than
19 the things you said here today, they never talked about
20 what had happened in there or anything like that?

21 A No.

22 Q Do you remember a conversation by those people including
23 Jay -- not about specifics -- but, man, that was so fucked
24 up, what happened?

25 A No.

1 Q Nothing like that?

2 A No.

3 MR. GRIFFIN: Nothing further.

4 THE COURT: Cross.

5 CROSS EXAMINATION BY MR. CHERNIN:

6 Q Ms. Franceschetti -- is it shettie?

7 A It's Franceschetti.

8 Q Okay. Ms. Franceschetti, Mr. Griffin just asked you some
9 questions about if Antonia knew something and what Antonia
10 was reacting to.

11 A Yeah.

12 Q At that time did you know somebody had been shot inside?

13 A I didn't know for sure, no, I just assumed.

14 Q You assumed that?

15 A Yeah. I didn't --

16 Q You assumed that at that time or some later time?

17 A Some later time.

18 Q And so when Ms. West or Antonia was reacting, you didn't
19 know what she was reacting to. Did you?

20 A No.

21 Q Had you ever been at any other location where Ms. -- where
22 you saw Ms. West see somebody get shot?

23 A No.

24 Q So you don't know what she was reacting to?

25 A No.

1 Q Just that she was upset. It could have been -- it may
2 have been that -- as Mr. Griffin would have you believe,
3 that she was upset about her brother shooting somebody.
4 Right?

5 A Yes.

6 Q Or it might have been that she was just merely upset
7 because she was just in a room where somebody got shot?

8 A Yes. It could have been anything.

9 Q It could have been anything?

10 A Yes.

11 Q And your thought that she knew who shot the person who had
12 been shot was just speculation on your part?

13 A Yes.

14 Q And again it was based upon nothing other than what?

15 A Just what she was saying, I can't believe he did that, and
16 that's really it.

17 Q And you don't know who she was talking to?

18 A No.

19 Q And you don't know what she saw?

20 A No, I don't.

21 MR. CHERNIN: Nothing further from this
22 witness. Thank you.

23 THE COURT: Redirect?

24 MR. GRIFFIN: Nothing.

25 THE COURT: You may step down.

1 (The witness leaves the stand.)

2 MR. CHERNIN: Judge, are you excusing
3 Ms. Franceschetti from her subpoena at this point?

4 THE COURT: Is either side going to be
5 recalling her?

6 MR. GRIFFIN: No.

7 MR. CHERNIN: No.

8 THE COURT: All right. You are released
9 from your subpoena, ma'am.

10 Ma'am, I'm going to have you come up to the
11 witness stand up here. I'm going to have you remain
12 standing. I want you to raise your right hand and my
13 clerk will swear you in.

14 JAIMIE WILLIAMS, being first duly sworn on
15 oath to tell the truth, the whole truth, and nothing but
16 the truth, testified as follows:

17 THE COURT: What I'm going to ask you to
18 do, ma'am, is to move your chair in directly to that bench
19 in front of you. Use the mike and have it just tilted to
20 a level that's comfortable for you to speak into.

21 THE WITNESS: Okay.

22 THE COURT: Speak up loud and clear. Begin
23 by stating your full name for the record, spelling your
24 first and last name.

25 THE WITNESS: Jaimie, J-A-I-M-I-E, Lynn,

1 L-Y-N-N, Williams, W-I-L-L-I-A-M-S.

2 THE COURT: You may begin.

3 DIRECT EXAMINATION BY MR. GRIFFIN:

4 Q Ms. Williams, you talk very, very fast, you make me seem
5 like I talk slow, so you've got to slow down and let the
6 court reporter get everything you say, okay.

7 THE COURT: Is that a yes?

8 THE WITNESS: Yes.

9 Q And you have to -- you can't nod your head yes or no. You
10 have to say yes or no.

11 A Okay.

12 Q Okay. You know why you are here today. Right?

13 A Yes.

14 Q You got a subpoena to come down and talk about what
15 happened back on January 30th and 31st of last year.
16 Correct?

17 A Yep.

18 Q On that January 30th -- that was a Friday night. Right?

19 A Yes.

20 Q Did you go to Bicardi's?

21 A Yes.

22 Q With whom?

23 A Myself.

24 Q Anybody else?

25 A No.

1 Q When you were at Bicardi's, did you see people that you
2 knew?

3 A Yes.

4 Q Like who?

5 A Lea -- well, I met Lea up there with her friend Deanna and
6 everyone else.

7 Q Like what are some of the names?

8 A Jaimie, Darnell, Isaiah, and then the people at the bar I
9 know, Kevin, Tony.

10 Q Did you know -- did you see a guy in the bar by the name
11 of Slim or the nickname Slim?

12 A Yes.

13 Q And how did you know Slim?

14 A He was around the people -- around people that I know.

15 Q And do you see Slim in court today?

16 A Excuse me?

17 Q Do you see Slim in court?

18 A Yes.

19 Q Where is he in the courtroom and what's he wearing?

20 A He's got a blue and striped shirt on. He's right directly
21 in front of me.

22 MR. GRIFFIN: May the record reflect the
23 witness has identified the defendant.

24 THE COURT: It does.

25 Q Did you speak with Slim at Bicardi's?

1 A I didn't have really conversations with him, no.

2 Q Did he speak to you?

3 A Yes.

4 Q What did he say?

5 A He asked if I could buy him a beer and I said no.

6 Q You said no?

7 A Yes.

8 Q And what did he do then?

9 A He called me -- he said fuck you, bitch.

10 Q Did he seem to you to be drunk?

11 A Yeah -- yes.

12 Q Do you recall telling the police that he appeared

13 intoxicated and was not acting right?

14 A Yes.

15 Q And when someone isn't acting right, what does that mean

16 to you when you say that?

17 A Not acting right?

18 Q Yeah.

19 A That they were intoxicated. They weren't -- they weren't

20 sober, like they wouldn't conduct themselves normally if

21 they were not intoxicated.

22 Q Like they would ask you to get them a beer, you would say

23 no, and they would say what he said, that's the kind of

24 thing when somebody isn't acting right?

25 A Yes.

1 Q At some point did you move from Bicardi's over to the
2 after-set there on Mineral?

3 A Yes, I drove.

4 Q You were not present however when the shooting took place.
5 Right?

6 A No, I was not.

7 Q Why not?

8 A 'Cause I got told to leave, I got my coat and I left and I
9 got Lea and we went to my car.

10 Q Who told you to leave?

11 A Isaiah.

12 Q And what did he tell you?

13 A He said, Jaimie, get your coat, there's going to be some
14 drama.

15 Q And to you what does drama mean?

16 MR. CHERNIN: Objection. Relevance.

17 THE COURT: Overruled. I'll allow it.

18 Q Well, drama doesn't mean a play like in the theatre like a
19 drama as opposed to a comedy. Right?

20 A No.

21 Q It means something else?

22 A Yes.

23 Q Like what?

24 A Maybe there was going to be altercations, drama, that's --
25 drama, altercations. Maybe something was going to happen.

1 It's just drama.

2 Q Drama means that things are going to be kind of like maybe

3 a fight, maybe worse, but nothing pretty?

4 A Could be, could be.

5 Q Right. Nothing pretty? Drama doesn't mean there's going

6 to be a dance in the bathroom?

7 A No, no.

8 Q Okay. Did you leave?

9 A Yes, I did.

10 Q And where did you go?

11 A To my car.

12 Q With whom?

13 A Lea.

14 Q And drove away?

15 A I started my car and I went to put it in drive and it

16 stalled because it was cold outside, so I had to wait and

17 have my car warm up and then --

18 Q Which lead to you being here today.

19 A Yes.

20 Q Why?

21 A Why?

22 Q In other words, what was it about the fact that you had to

23 stay and warm up your car, what happened next?

24 A Because -- oh, my car wouldn't let me go, it stalled, and

25 then people came and asked if -- if they -- if they could

1 have a ride in my car and I gave them a ride.

2 Q And who were those people?

3 A Antonia, Donald, Jay, and Don, Don's girl friend, I don't
4 really know her name.

5 Q Is there a picture up there of a woman? Right by your
6 right --

7 THE COURT: No, all the pictures have been
8 taken down.

9 MR. GRIFFIN: Oh, I'm sorry.

10 MR. CHERNIN: Are you showing her Exhibit
11 12?

12 MR. GRIFFIN: Yes.

13 Q This is a photograph marked Exhibit 12. Do you recognize
14 the person in that photograph?

15 A Yes.

16 Q Who is that?

17 A Antonia.

18 Q Is she -- back then was she a friend of yours?

19 A An acquaintance.

20 Q And Exhibit 22 -- does that say 22?

21 A Yes.

22 THE COURT: Is that a yes.

23 THE WITNESS: Yes.

24 Q Do you know that guy?

25 A Yes, I do.

1 Q Who is that?

2 A That's Jay. He was in my car.

3 Q So Jay, Antonia, Donald and Donald's girl friend --

4 A Yes.

5 Q -- get into your car?

6 A Yes.

7 Q Front seat, back seat, trunk?

8 A In the back seat 'cause Lea was in the passenger side. I

9 don't know what the order they were sitting in, but they

10 were in my car.

11 Q And what went on there when they got in your car?

12 A They asked me to drop them off at the designated

13 locations.

14 Q And when -- from the time they got in your car until the

15 time they were all gone, was there any conversation?

16 A Yes, there was.

17 Q Okay. What was that?

18 A Antonia seemed all nervous or -- and just agitated and she

19 came in there saying I can't believe he shot him, I can't

20 believe he shot him.

21 Q And what was Donald's reaction to that if any?

22 A Donald told her to shut the fuck up.

23 Q Did you know why he said that?

24 A I have no idea, no.

25 Q And was that the last you saw or ever heard of Antonia?

1 A Physically?

2 Q Ever in any way, letter, phone --

3 A No.

4 Q What happened?

5 A She called a couple times.

6 Q When?

7 A The next day and probably -- I can't -- a couple days

8 after I believe.

9 Q Was that unusual?

10 A Well, she doesn't usually call me a lot if that's what you

11 are asking.

12 Q Well, I'm asking you for her to call you a couple times

13 within a short time span like that was unusual?

14 A Yes.

15 Q Okay. And did you talk to her?

16 A No.

17 Q Ever?

18 A On the phone, no. After that, no.

19 Q At any point did you tell her something like on the phone

20 that you didn't want to know about what happened, she was

21 the one that has the problems with what she witnessed?

22 A Yes.

23 Q When did you tell her that?

24 A When she called. I -- which --

25 Q Take your time. Take a minute if you need it.

1 A In the car -- in the car -- in the car I said I don't want
2 to know what happened, I don't want to know anything,
3 that's you -- that's your problem. You people jumped in
4 my car, I gave you a ride, I thought I was being a good
5 Samaritan.

6 Q So do you know why she kept calling you then?

7 A No, I didn't answer the phone.

8 Q How did you know it was her?

9 A Caller I.D.

10 Q You talked with the police about this on February 2nd.
11 Right?

12 A Yes.

13 Q Okay. So that would have been now technically Monday?

14 A Yes.

15 Q Okay. And do you remember where that interview took
16 place?

17 A Oak Creek Country Kitchen, my work of place -- place of
18 work.

19 Q How long you talk to them?

20 A Probably a good hour, hour and a half I believe.

21 Q They went through different photographs with you to see if
22 you could identify who was at Bicardi's, who was at the --

23 A Yes.

24 Q Who was at the after-set. Correct?

25 A Yes.

1 Q And when you talked to them, I assume your memory was a
2 little bit fresher than it was today about everything that
3 had happened?

4 A Yes.

5 Q Okay. Do you recall telling the police about the incident
6 where Mr. Wilber asked you for the beer and all that? Do
7 you recall telling them that that had happened at the
8 after-set?

9 A It didn't happen at the after-set.

10 Q Okay. Did -- that's -- did you tell the police that?

11 A No, I -- not to my knowledge, no, 'cause it was -- it
12 didn't happen -- he didn't ask me that there. So maybe
13 that was a typo or something.

14 Q Do you recall telling them that at the after-set Slim
15 appeared to be agitated or --

16 A To my knowledge I don't think I said that.

17 Q Okay. You don't recall or you didn't say it or you are
18 not sure?

19 A I'm not sure. It's -- I'm not sure. It was a long time
20 ago. I'm not sure.

21 Q Were you with Lea the whole time at the after-set? I know
22 it was a relatively short time you were there, but were
23 you there with her the whole time?

24 A Yeah, she rode with me.

25 Q And did you see or hear the defendant say anything to her?

1 A No.

2 Q Do you recall telling the police that you weren't sure
3 what was actually said, but you heard Slim arguing with
4 people in the kitchen?

5 A There -- I -- there --everybody was at that party. There
6 was a lot of people, there were all kinds of voices, but I
7 never said that I heard Slim arguing 'cause there were too
8 many people in that house and I wasn't in the kitchen to
9 know what was going on. I was in the -- there was the
10 kitchen, the living room, and then the family room. I was
11 way in the family room.

12 Q And did you -- do you recall telling the police that what
13 Isaiah told you was get your coats, there's going to be
14 some drama with Slim?

15 A I do not remember saying Slim's name. I remember having
16 Isaiah tell me get your coats, there's going to be some
17 drama. I don't remember saying Slim's name, no.

18 Q Okay. And do you recall telling them that at 12:20 p.m.
19 according to your caller I.D. Antonia had called and left
20 you a message which meant that on January 31st at
21 12:20 p.m. -- which would have been, you know, about 9
22 hours or so after this all happened out there at the
23 after-set -- that Antonia called you?

24 A Yes.

25 Q And that she called and left a message, and then you

1 called her back, and before she could start talking about
2 anything, you told her that you were upset and didn't want
3 to hear anything and then told her you did not want -- you
4 told her that you did not want to know about what
5 happened, that she was the one that had the problems with
6 what she witnessed?

7 A Yes.

8 Q That was over the phone?

9 A Yes.

10 Q Okay. You didn't hear any gunshots while you were warming
11 up the car. Right?

12 A No, I was too far away from the house.

13 Q And after that conversation with Antonia, how many times
14 after that do you think she tried to call you back?

15 A Maybe one time.

16 Q So you had already basically told her that you didn't want
17 to talk to her, but she was still trying to call you?

18 A Yes.

19 Q Was there anyone else that -- at any time in Bicardi's, at
20 any time in the after-set, any time that -- before the
21 people got in your car, did you see anyone else acting out
22 of sorts or unusual or rude?

23 A No.

24 Q And other than Mr. Wilber?

25 A Well, rephrase that please.

1 Q Did anyone else ever tell you that night fuck you, bitch?

2 A No.

3 Q Do people talk to you like that often?

4 A No.

5 Q And after when these four people got in your car, did you
6 know what had happened?

7 A No.

8 Q When did you find out it was a shooting?

9 A Well, when Antonia said that, that's when I knew somebody
10 got shot because of her saying that in my car.

11 Q Saying what?

12 A I can't believe he shot him, I can't believe he shot him.

13 Q When she said that, did you believe she knew who had done
14 it?

15 MR. CHERNIN: Well, objection. It calls
16 for speculation.

17 MR. GRIFFIN: About what she believed?

18 THE COURT: Well, objection overruled.

19 MR. CHERNIN: As to why he believed what
20 somebody else believed?

21 Q In other words, when she said I can't believe he shot him,
22 I can't believe he shot him, did you think that she had
23 knew who had done it?

24 A I think so, yes, because of her saying those statements.

25 MR. GRIFFIN: Nothing further.

1 THE COURT: Cross.

2 CROSS EXAMINATION BY MR. CHERNIN:

3 Q When Mr. Griffin asked you if there were some errors made
4 in the reports that the police wrote, you were given an
5 opportunity to review those reports some time in the last
6 few days. Right?

7 A Today, yes.

8 Q Today. And when you read them, you said, hey, there's
9 something wrong here. Is that correct?

10 A Yes.

11 Q And on February 1st of 2004 when you made these
12 statements -- I'm sorry -- 2nd, it was that Monday -- on
13 February 2nd, 2004, when you were making that -- those
14 statements to the police, you weren't trying to lie to
15 them. Were you?

16 A No.

17 Q They were putting down their words as to something.
18 Right?

19 A Yes.

20 Q And it wasn't your choice of words. Right?

21 A No.

22 Q Now, when you received a call -- first of all, you said
23 you were friends with Antonia or acquaintances of Antonia
24 West, but were friends with other people that she was
25 friends with. Is that correct?

1 A No, meaning they are all acquaintances. The only friend
2 that I consider is a friend is Lea.

3 Q Okay. So people -- other people that you knew, knew
4 Antonia. Correct?

5 A Yes.

6 Q And so on February 1st at 12:20 p.m. when you looked at
7 your caller I.D., you recognized Antonia's number. How is
8 it that you knew it was Antonia's number if you were only
9 acquaintances with her?

10 A Because it came up as Wilber and that's their last name,
11 so that's -- that's -- and it's Sandy Wilber, I know that,
12 I know the phone -- I mean, I know the name, but she's
13 called me once or twice before that, but that's not a
14 friend, it's an acquaintance.

15 Q Okay. And when you received that call but didn't accept
16 it, how do you know that it was her calling you from Sandy
17 Wilber's residence as opposed to somebody else that knew
18 you, that knew her?

19 A I don't believe -- I believed it was Antonia that called
20 me. It could have been, but I believed it was Antonia.

21 Q That's just your belief based upon your guess. Right?

22 A Yes, my assumption.

23 Q And with respect to the knowledge of what Antonia knew,
24 had you ever been at another location where Antonia had
25 witnessed somebody being shot?

1 A No.

2 Q And so you've never experienced Antonia's reaction to
3 watching somebody be shot or being in a room where
4 somebody else was shot?

5 A No, I -- no.

6 Q And when Antonia tried to call you and you made the
7 statement to her, you said that you started talking right
8 away and just started saying, look, don't call me,
9 whatever you want -- whatever you know about is your
10 business, leave me alone. Right?

11 A Yes.

12 Q What did she say to you? Did she say hello, Jaimie?

13 A I cannot remember, it was a long time ago, but all I know
14 is I told her whatever happened is your business, I don't
15 want to know anything, I'm done.

16 Q So the point is you don't know anything?

17 A No.

18 Q Correct?

19 A No, I just assumed. I assumed, so I told her don't call
20 me no more.

21 Q And your assumption may be correct and it might not be
22 correct. Correct?

23 A Correct.

24 MR. CHERNIN: Thank you.

25 THE COURT: Any redirect?

1 MR. GRIFFIN: No.

2 THE COURT: You may step down.

3 (The witness leaves the stand.)

4 THE COURT: Is either side going to be
5 recalling this witness?

6 MR. GRIFFIN: No.

7 MR. CHERNIN: No.

8 THE COURT: Ms. Williams, you are now
9 released from your subpoena. Sidebar with the lawyers.
10 (Whereupon, an off the record discussion
11 was had.)

12 THE COURT: All right. Thank you, ladies
13 and gentlemen, for your patience today. The lawyers have
14 advised me that this is the last witness for the day, the
15 State has advised me of that, and I am going to take up
16 some matters now in the next 20 minutes to try and see
17 where we are at with witnesses and so forth.

18 I had indicated to you I was going to try
19 to keep you abreast of where we are going in terms of time
20 frames. I will know a little bit better at the end of the
21 day today because I'm going to have a discussion with the
22 lawyers about the remaining witnesses and what else needs
23 to be done. I'm also going to make some additional
24 rulings outside your presence, as I've told you I've been
25 doing all along, and that is, as I've advised you from the

1 beginning, my role is to determine the law, your role is
2 to be the fact finders, and you will have more of an
3 instruction on that issue when we come to the jury
4 instruction phase of the trial.

5 Tomorrow morning you -- well, tonight one
6 of my deputies will -- again, get all your belongings
7 together. Collectively you will go out. We are not going
8 to have you stay. You are all going to be escorted back
9 to the Courthouse, and from there how you depart to your
10 cars or to your bus stops or whatever is obviously your
11 direction, but the deputies will escort you back down.

12 Tomorrow morning I want you to report to
13 Jury Management at 8:15 and you will remain down in Jury
14 Management together -- and they will be advised of this --
15 until my deputies come down to bring you up to the trial
16 and into the jury room.

17 In addition, while you are down there, you
18 are not to commingle, in fact, we will advise Jury
19 Management that they are to have you off to a separate
20 area, but you are not to commingle with other jurors or
21 prospective jurors, you are not to discuss the case with
22 anyone -- any staff member or anyone else until directed
23 to do so by this Court. So when you get down -- when you
24 report to Jury Management -- and don't stagger in early at
25 8 or 8:05 or 8:10. At 8:15 report to Jury Management and

1 they will have -- will be advised and have a room or a
2 separate area for you to be in. My deputies will be down
3 there within 5, 10 minutes to pick you up, bring you up to
4 the jury room together as a group.

5 Again, the same admonition, please don't
6 discuss this case with each other, with anyone until
7 directed to do so by this Court. In addition, when you go
8 home tonight, make sure that you get a good night's rest
9 and come back ready to work. Again tomorrow morning I'll
10 be in a better position, as I said earlier, to hopefully
11 give you better guidance on how many more days that we're
12 going to be on the record here before we get to the
13 conclusion of the trial. It will be my best guess, but it
14 will be a better guess tomorrow morning than it is
15 tonight.

16 All right. Thank you all, ladies and
17 gentlemen. We will see you tomorrow morning.

18 (The following proceedings were held
19 outside the presence of the jury.)

20 THE COURT: The Court wants to make a
21 record of two additional matters that came up in the
22 afternoon session. One of which is a -- something that
23 occurred actually on the record involving the lawyers and
24 their desire to have a sidebar about it and the other
25 involves something that occurred over the lunch hour and a

1 ruling that the Court made based on that information that
2 I became aware of.

3 The first issue has to do with an
4 objection -- or has to do with what I believe is Exhibit
5 41. The lawyers started to advise me off the record about
6 a -- a particular written statement I believe it was, and
7 it was marked Exhibit 41, about three pages long, that
8 Mr. Griffin wanted to examine or ask questions of
9 Mr. Niles about and that it purported to be a written
10 statement from Mr. Niles concerning another legal matter,
11 particularly a homicide that the Police Department was
12 investigating and believed that Mr. Niles had some
13 information concerning or knew something about, the
14 purpose of which was for Mr. Griffin as I understood his
15 position to be able to -- well, it was -- I believe it was
16 two parts, but I will allow both sides to comment and to
17 supplement the record. The first reason I understood
18 Mr. Griffin wanted to introduce it through Mr. Niles was
19 that it would be additional evidence of additional matters
20 that were discussed during the time frame that Mr. Chernin
21 had explored with Mr. Niles on cross examination, that is,
22 how long the witness had been held -- whether in custody
23 or not, had been held by the police in connection with
24 questioning in this matter, and there was a long line of
25 questions on cross examination by Mr. Chernin of Mr. Niles

1 about that issue and the length that he had been kept --
2 that is, Mr. Niles had been kept or held concerning this
3 matter. Mr. Griffin wanted to be able as I understood it
4 at sidebar to explore whether or not during the course of
5 this time that Mr. Niles had been held other matters in
6 addition to this investigation had been talked about and
7 whether he had been questioned about that by the police,
8 the purpose of which is to establish for the jury or at
9 least portray to the jury that there were other reasons as
10 to the length or why Mr. -- to account for the time that
11 Mr. Niles had been ostensibly held by the police for
12 questioning.

13 In addition, as I understood it,
14 Mr. Griffin wanted to establish whether or not there was
15 anything about Exhibit 41, that is, another statement
16 purportedly written or signed by Mr. Niles that was either
17 twisted or fabricated or in some way made up by the police
18 as he had on cross examination indicated he believed had
19 happened with his statements in Exhibit 36 and 37.

20 The issue -- that's what I understood was
21 the purpose of having that document used by the State in
22 its redirect of Mr. Niles after the lunch hour. The issue
23 came up from the defense's perspective as I understood it
24 as to whether or not in introducing that document to the
25 witness Mr. Griffin would be allowed to refer to it as

1 that he was -- Mr. Niles was -- was being asked by the
2 Milwaukee Police Department or detectives about another
3 homicide. Mr. Chernin had preferred that -- believed that
4 that was inflammatory and believed that it would be more
5 appropriate and just as useful for the State to simply
6 refer to it as simply another matter. The State then in
7 sort of a exchange at sidebar with the defense asked how
8 this was inflammatory to the defendant and what would be
9 the inflammatory nature towards the defendant and at that
10 point I believe Mr. Chernin indicated that that was a good
11 question and the Court indicated to -- that I was siding
12 with the State, that while it may have some
13 inflammatory -- I'm not so sure that it does, but to the
14 extent it does, it goes to the witness on the witness
15 stand, not the defendant himself. Without some sort of a
16 nexus or correlation to the defendant, I was not going to
17 sustain the objection. I think that is a fairly accurate
18 summary of what we talked about at sidebar on that issue,
19 gentlemen. Mr. Griffin, you may supplement the record on
20 that point.

21 MR. GRIFFIN: I -- I agree, that's what
22 happened.

23 THE COURT: Mr. Chernin, you may supplement
24 the record on that point.

25 MR. CHERNIN: I have nothing to add.

1 THE COURT: With respect to the second
2 issue, the one that I talked about that happened off the
3 record, having no connection to the defendant so my
4 comments aren't intended to be interpreted that way at
5 all, but it has to do again with the operation -- the
6 smooth operation of this court and the attempts by this to
7 continue to make sure that the sanctity of the jury, the
8 sanctity of the trial process is respected and upheld so
9 as to insure the defendant has a fair trial. In that
10 regard the Court on an ongoing basis noticed two things
11 with respect to two individuals in the gallery. One
12 individual was in the -- the young darker skinned male
13 sitting in the front seat who appears to the Court to have
14 been here all week, I know that he was wearing a red shirt
15 on an earlier date, today he was in the front row sitting
16 next to a young lady at times sleeping on her or embracing
17 or hugging her, he had an orangish yellow shirt on. To
18 the rear in the rear seat gallery just over the
19 individuals' that I've just described left shoulder was
20 another young what appeared to be dark skinned or
21 African-American male that had a blue -- a pale blue shirt
22 on. Again, this is an individual that I've noticed in the
23 gallery on at least one prior occasion other than today's
24 date. The Court indicated to the bailiffs that with
25 respect to the female and the male in the blue shirt, that

1 they should remove their gum and be instructed to do that
2 at one of the breaks and that the gentleman in the
3 orangish yellow shirt was instructed to stop sleeping on
4 the female next to him in front of the presence of the
5 jury. About 35 minutes into the lunch hour, which was
6 about 12:35, 12:40, deputies advised me that as they were
7 patrolling the hallway directly outside my chambers area
8 and the jury room area, the gentleman in the orangish
9 yellow shirt was leaning directly up against the door that
10 I use to have access to this courtroom from the outside
11 hallway and had his ear pressed up against the door. The
12 deputies had advised him to move away from the door, and
13 as soon as they turn their back and were walking away from
14 the scene, the individual apparently returned to the same
15 position and was again leaning up against the door in an
16 attempt to as the deputies described it to me listen in.
17 The deputy indicated to me that in fact it was his belief
18 that the individual in the orangish yellow shirt was still
19 right outside the door, that if I were to open my door, he
20 would be right there. I opened the door and sure enough
21 he was right there within about a foot of the door. I
22 advised the deputies when we came back in that they should
23 instruct the defendant -- or the individual, the gentleman
24 in the orangish yellow shirt that I've observed in the
25 gallery, that he was forbidden from lingering in that

1 immediate area and that if he did not cooperate, he is to
2 be instructed or directed out of this building. The
3 deputies advised me that he in fact was told just that and
4 his response was -- and this is a paraphrase, but a fairly
5 accurate quote I believe -- do you fucking own the hallway
6 now too, and my deputies indicated that if he did not
7 move, they were going to cite him for disorderly conduct.
8 The individual then said this is fucked. Apparently
9 the -- some individual, I'm lead to believe that it may be
10 the defendant's mother, intervened and indicated that --
11 and told all of them that they should leave and they all
12 left together. So she was cooperative from the best of
13 what my deputies have advised me, the older female in the
14 gallery, and the other individuals followed suit when she
15 left and they followed and were lead out as well.

16 Both the gentlemen -- the gentleman in the
17 blue shirt was also observed by the deputies on his cell
18 phone. Just as I had indicated yesterday, I had observed
19 people coming in and out, and he was one of them. That
20 after witnesses were on the stand, individuals would --
21 that were in the gallery, including the gentleman that I
22 observed today in a pale blue shirt, leaving to go down
23 and to be or to mingle in the immediate area if not
24 directly next to witnesses in the case in direct violation
25 of my sequestration order. Today he was observed by the

1 deputies on his cell phone as he would exit the court and
2 was heard to have said to someone on the other end
3 something to the effect of have you finished your
4 testimony yet, oh, that's shit, and then hung up when he
5 observed the deputies coming near him.

6 For those reasons and because of the
7 information that has been provided to me and because again
8 of my own observations of some of these ongoing activities
9 in the gallery from my perspective up here on the bench
10 and so as not to create any issue in front of the jury,
11 the Court has directed the deputies that those two
12 individuals are barred from further -- from participating
13 in any way, including sitting in the gallery during these
14 proceedings. I believe there is a sufficient basis for
15 that. They were acting in an appropriate fashion in
16 direct contravention of not only the Court but the
17 deputies' directives, and when confronted with this
18 behavior, again responded in a totally inappropriate
19 fashion. They have not demonstrated to this Court's
20 satisfaction that they are able to comply with even the
21 most basic or simple directives of the Court with respect
22 to conduct in the courtroom in front of the jury or in
23 compliance with sequestration orders that I am issuing in
24 this case or have issued in this case.

25 With respect to the defendant's mother, she

1 was advised that she is welcome back to this court, that
2 the directive is directed specifically to those two
3 individuals and those two individuals only. Any and all
4 other family members that have been here and have not been
5 a part of any of these issues are certainly welcome back,
6 these are public courtrooms, and have not demonstrated to
7 me in any way, shape or form that they should be under
8 such an order and so they were advised by my deputy, Roy
9 Felber, that they may return for the remainder of these
10 proceedings and that the order was limited for purposes of
11 my ruling to the two individuals that I have attempted to
12 describe here today.

13 In addition, the defense counsel just a few
14 moments ago when we were in chambers and the Court was
15 trying to determine whether or not we had any additional
16 testimony anticipated tonight attempted to explain to me
17 what he understood or -- in terms of any facial -- perhaps
18 inappropriate facial gestures from the witness, Oscar
19 Niles, that I may have seen and misinterpreted. I
20 indicated that I know what I had seen and it is different
21 from what defense counsel is attempting to explain to me,
22 but I have indicated that he will certainly have an
23 opportunity to put that on the record. I further
24 indicated to him that my comments were directed to
25 Mr. Niles, I admonished Mr. Niles, I indicated to

1 Mr. Niles that that behavior would not be acceptable of
2 what I have observed, and I know that he knows that I know
3 what he looked at and what he did because when I
4 confronted him directly here, which is on the record and
5 the parties are free to look at the transcript from
6 yesterday -- from earlier today in which I had the
7 exchange with Mr. Niles, Mr. Niles when I said you know
8 exactly what I'm talking about acknowledged and shook his
9 head and said, yes, ma'am. I said that is -- you are not
10 to do that anymore or something to that effect. My
11 admonition to the witness I believe was correct and
12 appropriate given the circumstances of what I had observed
13 and his interaction with the State's counsel and it was in
14 no way attributed to Mr. Wilber, the defendant in this
15 case, only to the extent that it was in Mr. Wilber's
16 direction that those facial -- that facial gesture had
17 been made. I in no way in my comments was implying or
18 inferring that Mr. Wilber had incited the witness or had
19 directed him to do that. I just simply indicated that --
20 and again the record should reflect this -- that it was
21 this Court's impression that the facial nod and gesture --
22 facial gesture which involved the mouth and eye of the
23 witness was directed in the immediate direction of the
24 defendant. That observation was not intended to serve as
25 inculpatory behavior on the part of the defendant himself.

1 It was only when the defendant again reacted in what I
2 believed to be again an inappropriate fashion to this
3 Court's admonitions and rulings, when I observed him
4 laughing, that this Court then directed its attention to
5 Mr. Wilber and indicated do you find any of this funny.
6 It is that behavior that the Court was citing Mr. Wilber
7 with, not implicating him in any type of improper behavior
8 with the witness on the witness stand. Mr. Chernin, you
9 wanted to provide this Court as you attempted to in
10 chambers with your observations or explanation of that
11 incident.

12 MR. CHERNIN: I think with the Court's
13 further clarification now on the record, that's fine.
14 I -- there's nothing more that need be said.

15 THE COURT: It's 5:35, gentlemen, and I
16 obviously need to make a ruling at some point on this
17 demonstrative evidence, but I am more interested at this
18 point quite honestly 'cause I think I do understand the
19 issues -- the issue as I understand it is that the State
20 wants to use demonstrative evidence. The defense's
21 position is twofold, No. 1, it's testimonial in nature.
22 While it may be demonstrative, it is testimonial in nature
23 and it is distinguishable from Hubanks in that regard and
24 should not be allowed. To the extent that it is non
25 testimonial in nature, it is still highly prejudicial and

1 suggestive to the jury and should not be allowed.

2 The Court started to ask the State --
3 because they are the proponent of the evidence -- why it
4 is relevant, and that's the test of any evidence that's
5 put in demonstrative or otherwise, what is its relevance
6 and how will it -- in the case of demonstrative evidence,
7 how will it aid or assist the trier of fact, that is, the
8 jury. The State will need to respond to that and that was
9 a proper question I believe raised by the defense when
10 they were even talking about the first half of their
11 objection to this, which is whether it's testimonial in
12 nature or not. The State has already argued its point
13 that it doesn't believe for the reasons it's already
14 stated that it is testimonial in nature, but I will allow
15 both sides within that framework because I think that is
16 the issues -- those are the issues as I see them on this
17 point to future elaborate and I will make my final ruling
18 on that tomorrow morning.

19 I do need to go through the witness list,
20 gentlemen, particularly with you, Mr. Griffin. I have
21 been keeping track of some things and I want to, just so
22 that I get a better sense, a ballpark feeling about where
23 we are going here, if you look at the State's witness
24 list, who is it that you intend to -- remaining witnesses
25 that you intend to call tomorrow and in what order?

1 MR. GRIFFIN: The citizens you mean?

2 THE COURT: Any police officers or citizen
3 witnesses. Just witnesses generally.

4 MR. GRIFFIN: Well, I will start with the
5 citizens. Jeranek Diaz.

6 THE COURT: All right.

7 MR. GRIFFIN: Richard Torres.

8 THE COURT: Yes.

9 MR. GRIFFIN: Jill Neubecker.

10 THE COURT: Anyone else?

11 MR. GRIFFIN: Citizen wise?

12 THE COURT: Citizen wise.

13 MR. GRIFFIN: No.

14 THE COURT: All right. Law enforcement?

15 MR. GRIFFIN: Tim Duffy -- these are
16 possible still, I mean, I -- you know, I'm not -- Joe
17 Erwin.

18 THE COURT: One moment. Go ahead.

19 MR. GRIFFIN: Scott Gastrow, Eric
20 Villarreal, Rubin Burgos, Kent Corbett, Mike Caballero.
21 It's possible Greg Schuler. He took statements from both
22 Jeranek Diaz and Richard Torres, but I don't expect I will
23 need him, but it's possible.

24 THE COURT: You have three citizens. I've
25 got all the others.

1 MR. GRIFFIN: Lewis Johnson.

2 THE COURT: Go ahead. He was the one that
3 we had added, along with Officers Jose Lazo and Gilbert
4 Collato.

5 MR. GRIFFIN: And those are the other two.
6 Now I can tell the Court that it's extremely possible that
7 with Detective Corbett I would then not need to call
8 Detective Caballero, but I assume the Court is asking me
9 sort of the -- not every single possible witness, but
10 narrowing it down to a list of possible witnesses who are
11 truly possible. Am I sort of understanding it correctly?

12 THE COURT: Yes.

13 MR. GRIFFIN: I don't mean to talk like
14 Mr. Niles, but so --

15 THE COURT: All right.

16 MR. GRIFFIN: It's about 11 or 12. To be
17 totally honest with the Court, my guess is it will be more
18 like 9 or 10.

19 THE COURT: Well, it's about 14 all
20 together.

21 MR. GRIFFIN: Oh.

22 THE COURT: And your guess is that it may
23 be closer to 11 or 12.

24 MR. GRIFFIN: Correct. For example -- and
25 some will be quick, I mean, for all I know, there will be

1 a stipulation that the defendant was arrested on February
2 20th by Officer Collato at such and such an address and
3 the time and date. Corbett and Caballero were partners,
4 there may be no need to call them. Gastro and Villarreal
5 are partners, there may be no need to call them both, but
6 again --

7 THE COURT: Who do you expect to call first
8 tomorrow morning?

9 MR. GRIFFIN: Joe Neubecker along with Lazo
10 and -- and then Lazo and Erwin to deal with the burning
11 barbecue stuff.

12 MR. CHERNIN: So you have no intent to call
13 Buschmann?

14 THE COURT: Detective Carl Buschmann is
15 listed as a potential. I did not hear his name called
16 off.

17 MR. GRIFFIN: I thought the defense was
18 calling Detective Buschmann, but --

19 THE COURT: Let me turn to that right now.
20 Mr. Chernin, of the -- two things. No. 1, who do you
21 expect to be calling?

22 MR. CHERNIN: Well, I --

23 THE COURT: You had listed --

24 MR. CHERNIN: Judge, Bill Kohl.

25 THE COURT: That's correct.

1 MR. CHERNIN: Phia Ly.

2 THE COURT: One moment.

3 MR. GRIFFIN: Can we go off the record for
4 a second, Judge?

5 (Whereupon, an off the record discussion
6 was had.)

7 THE COURT: Let's go back on the record.
8 Bill Kohl, Phia Ly. And who else, Mr. Chernin?

9 MR. CHERNIN: Your Honor, I think we are
10 going to be able to have a stipulation. We will have that
11 for the Court with respect to Mr. Ly. And then
12 Mr. Bernhagen is the person who measured Mr. Wilber's foot
13 and I'm not -- I'm still not certain what the Court is
14 allowing the State to --

15 THE COURT: Yes, you are, and so
16 Mr. Bernhagen's testimony would not be permissible because
17 I'm not going to be getting into any evidence -- I've
18 already indicated to you twice now, Mr. Chernin, and I
19 will reiterate a third time, any questions about what the
20 people from Timberland did or didn't do, said or didn't
21 say with respect to their versions of what this shoe size
22 was that was recovered from the grill is not going to be
23 permissible, so in that regard, there is nothing to
24 compare it with in terms of Mr. Wilber's shoe size.
25 Although you can certainly ask Mr. Wilber what his shoe

1 size is to the extent that that is relevant. The Court
2 has indicated to you that the area of -- of cross
3 examination on the materials recovered from the grill is
4 again limited to whether or not the detectives -- and I
5 believe it was either Buschmann or Glidewell because I
6 know Glidewell has been added to your list -- whoever it
7 is that wrote the report or reports, whatever detectives
8 they were, with respect to the recovery of materials from
9 the grill outside the residence on 26th, 27th and Forest
10 Home, that they can certainly be questioned about their
11 reports -- or their investigations which are covered in
12 their reports. The investigation being whether or not
13 they were able to conduct any additional -- whether or not
14 they conducted any additional investigation into the
15 identification of that material that was found and
16 recovered from the grill, and secondly, whether or not
17 that investigation in terms of the identification of that
18 material was successful, and then finally, whether or not
19 it was tied -- whether they were able to establish that it
20 was tied to the defendant in any way, shape or form. My
21 expectation is given that I've read that report, that the
22 answer to that is no. Yes, they conducted an
23 investigation to try to determine what the contents of
24 that grill were and whether or not those contents were
25 tied forensically to the defendant.

1 MR. CHERNIN: Okay, those are two different
2 groups of officers, two different groups of detectives
3 because it was Erwin that found -- Erwin and Duffy that
4 found the shoes, so I'm going to have to call Buschmann
5 unless -- Carl Buschmann or Michael Wesolowski to say that
6 they conducted investigations that lead to nothing -- lead
7 to no tie -- lead to nothing tying these to Mr. Wilber.
8 So, fine, so then my witnesses -- if they are not going to
9 include Mark Bernhagen or Phia Ly, I will need either
10 Detective Buschmann or Detective Wesolowski.

11 THE COURT: Well, it sounded as if you were
12 going to have Bill Kohl. I haven't denied his -- I assume
13 he's still a witness.

14 MR. CHERNIN: Yeah, Bill is still a witness
15 and Bill --

16 THE COURT: And Phia Ly -- well, you've
17 indicated -- and I don't want to presume anything -- that
18 there's some stipulation as to what Phia Ly -- I don't
19 know who this witness is or what connection they have to
20 this incident, but it sounds as if what you are telling
21 me, whatever they are going to be testifying to, the State
22 is going to stipulate to. Mr. Griffin, is that correct?

23 MR. GRIFFIN: Right, she owns the -- is it
24 a he or a she?

25 MR. CHERNIN: It's a he.

1 MR. GRIFFIN: He owns the building and he
2 would be called to talk about the fact that the
3 measurements Mr. Kohl --

4 THE COURT: Owns the building where?

5 MR. GRIFFIN: At 1128 West Mineral and
6 Mr. Kohl took measurements in there after there had been
7 some remodeling. To say that while the interior
8 decorating has changed, the building is sort of the same.
9 I don't expect Mr. Kohl to lie about anything, I would be
10 shocked if he did, and so I can't believe that I'm going
11 to be hitting Mr. Kohl on the notion of, yeah, those are
12 different cabinets unless it somehow relates to the
13 events, but --

14 MR. CHERNIN: Well, the facing of the
15 cabinets are different, but the footing is the same.

16 MR. GRIFFIN: And the cabinets are in the
17 pictures up there.

18 MR. CHERNIN: Right, but these are
19 different -- well, we have different pictures because we
20 took some more recent pictures. The cabinet facing is not
21 the same color as the color that -- on the day that it was
22 taken. They now have -- there's a -- I'm showing it to
23 Mr. Griffin -- there's a new white counter top and a --

24 THE COURT: What is this evidence intended
25 to show?

1 MR. CHERNIN: Oh, it supports the
2 measurements that we took, Your Honor, of the interior and
3 where people were standing at the time.

4 MR. GRIFFIN: Based on --

5 MR. CHERNIN: Based upon witness testimony.
6 So what it shows is the measurements that are reflected in
7 those diagrams that are not to scale, we've got the actual
8 measurements, and Mr. Lee's testimony would have been that
9 he refaced the cabinets, but that the cabinets are in the
10 same location and in the same footing as the cabinets were
11 on January 31st.

12 THE COURT: Let me back up. The relevant
13 evidence is that Mr. Kohl will testify that he took
14 measurements on -- of the inside of that residence of each
15 of the rooms and other particulars.

16 MR. CHERNIN: Some additional measurements
17 that were not taken by Detective Casper.

18 THE COURT: Of those rooms and that these
19 are the actual measurements of them and you expect the
20 measurements to be different -- not different or just in
21 addition to what the State has had Detective Tom Casper
22 testify to with -- relative to Exhibit 1?

23 MR. CHERNIN: Right, Detective Casper --

24 THE COURT: Yes or no?

25 MR. CHERNIN: Yes, and I will give you an

1 example. Detective Casper didn't tell us the width of the
2 cabinets from the east wall of the kitchen -- I'm sorry --
3 the south wall of the kitchen to the north edge of the
4 cabinet, so we have that measurement as well.

5 THE COURT: Why would we need Mr. Phia Ly
6 or any photographs to support Mr. Kohl's testimony if the
7 State is going to concede that those are Mr. Kohl's
8 measurements.

9 MR. CHERNIN: Well, Your Honor, I didn't
10 know that until now and that they were going to concede
11 that these measurements are correct, and we have some
12 photographs that Mr. Kohl is going to refer to in his
13 testimony. The facing on the cabinets is different than
14 the -- in our photographs than in Exhibit 14 and 15. For
15 example, 14 and 15 have dark wood cabinets.

16 THE COURT: But why is that important to
17 what happened, why is that relevant? What is the cabinet
18 color, the fact that the cabinets were changed since
19 this -- after this incident occurred relevant to this case
20 at all?

21 MR. CHERNIN: Because the measurements
22 would be -- remain unchanged, in other words, the
23 distances in the -- in the cabinets that appeared in the
24 photographs from January 31st of 2004 and those
25 photographs that were taken by Mr. Kohl of those -- of the

1 new cabinets, that the measurement of the cabinets is the
2 same. They used the same size cabinets to replace those
3 that had been in the pictures in January of 2004.

4 THE COURT: Do you have any reason to doubt
5 that, Mr. Griffin?

6 MR. GRIFFIN: Of course not. I mean, we're
7 going to see them in the picture anyways. Right? What --
8 let's assume they are off by a half an inch, let's assume
9 they are off by a inch, who cares.

10 MR. CHERNIN: Right, but they are
11 different, so I didn't know if you would know that by
12 looking at the pictures.

13 MR. GRIFFIN: Mr. Kohl can simply say they
14 are different and the landlords told him true or not that
15 they were the same measurements, the cabinets took up the
16 same width, depth and height. I don't care.

17 THE COURT: And Mr. Kohl can testify to the
18 fact that he interviewed the owner and the owner advised
19 him that these are the same. While that may be hearsay,
20 it's going to be permissible hearsay by virtue of the
21 State's agreement or stipulation that what Mr. Kohl is
22 saying is true, that he took these measurements?

23 MR. GRIFFIN: I have no intent of objecting
24 on hearsay grounds.

25 MR. CHERNIN: Then it is fine. This

1 discussion has taken longer than it would have taken to
2 present Mr. Ly, I'm telling you, I mean, his testimony is
3 very short, we've got it down, so I won't call Mr. Ly on
4 that basis.

5 Then the other person would be
6 Mr. Bernhagen. Mr. Bernhagen's testimony would become --
7 would not be relevant unless somehow it comes out that it
8 was a size 12 shoe that the officers recovered from the
9 grill.

10 THE COURT: But that's not coming in.

11 MR. CHERNIN: Okay.

12 THE COURT: I've already directed the
13 parties that that's not coming in.

14 MR. CHERNIN: Okay. Well, and, Your Honor,
15 just to preserve the record, we're not waiving the
16 argument as to relevancy, and I respect the Court's
17 already ruled on that, but I just want to make that a
18 continuing part of the record, that we are not agreeing
19 that the stuff recovered from the grill is relevant.

20 THE COURT: It is what?

21 MR. CHERNIN: Relevant.

22 THE COURT: You've objected and told me and
23 your client made it adamantly clear yesterday at noon that
24 this Court didn't really know what it was talking about
25 when it made that ruling, so I think I get the picture, I

1 mean, short of you coming and putting a hammer over my
2 head, I -- I think I'm, you know, bright -- reasonably
3 bright enough to figure out that you and your client don't
4 agree. Is that a reasonable assessment to say that you
5 and your client don't agree with my ruling?

6 MR. CHERNIN: Yes, but I would never use a
7 hammer, Your Honor, perhaps --

8 THE COURT: Never mind. All right. Who
9 else? What about this Herb Glidewell.

10 MR. CHERNIN: Herb Glidewell may testify in
11 the event that the State doesn't agree that Mr. Wilber was
12 on his way to my office to turn himself in to the police
13 at the time that the warrant squad arrested him on the
14 street, that he was taken into custody by the warrant
15 squad.

16 THE COURT: We had a discussion about this
17 earlier and it was off the record and I remember advising
18 you, Mr. Chernin, that there's some dangers with how you
19 present this particular tact because I will not allow you
20 to become a witness and you are or could be -- and there's
21 a strong, strong possibility that you could be depending
22 on the tact that you take. If you insert yourself in
23 these proceedings, then Mr. Wilber's entitled to another
24 counsel, so that's a real dangerous or dicey area and I
25 think I did communicate that to you a couple days ago,

1 which is why I need to know what it is that you are going
2 to try and present in that regard.

3 MR. CHERNIN: That Detective Glidewell had
4 made arrangements to come to my office on I believe it was
5 February 20th of 2004 -- I think that was the date --
6 maybe the 21st of 2004 for the purpose of having
7 Mr. Wilber surrender himself to the detective.

8 THE COURT: Again, I'm not sure -- I'm not
9 clear on that. Let me put it this way, are -- how is that
10 going to come in?

11 MR. CHERNIN: Detective Glidewell would
12 testify that he had made arrangements to come to my office
13 to take Mr. Wilber into custody.

14 THE COURT: And why is that relevant?

15 MR. CHERNIN: Just as the shoes might be
16 argued to be consciousness of guilt, you can also argue
17 consciousness of I turned myself in, of good conduct.

18 THE COURT: Well, but somebody has to make
19 that assertion. It sounds as if the defendant has to make
20 that assertion. So is the defendant going to take the
21 witness stand, I was turning myself in pursuant to an
22 agreement I had made with law enforcement or my lawyer had
23 made on my behalf with law enforcement. How else does
24 that --

25 MR. CHERNIN: Well, I'm not certain on law

1 enforcement can't make the representation that they were
2 coming to take him into custody, otherwise how would the
3 warrant squad have known to come to my office at -- I
4 think it was 12:30 on that day or 1:30.

5 THE COURT: So you want to be able to put
6 Herb Glidewell on the stand to ask him how it was that
7 Mr. Wilber came into custody?

8 MR. CHERNIN: Yes.

9 THE COURT: And how do you propose to do
10 that? How do you propose to ask him that?

11 MR. CHERNIN: Detective Glidewell, did you
12 make arrangements -- did you make arrangements to come and
13 take Mr. Wilber into custody at 839 North Jefferson on
14 February 20th or 21st of 2004.

15 THE COURT: Do you know what his answer is
16 going to be?

17 MR. CHERNIN: Yes.

18 THE COURT: Mr. Griffin?

19 MR. GRIFFIN: Well, I mean, this is truly
20 testimonial. We're getting to the defendant's intent on
21 February 20th. The only source of any of this information
22 could be initially from Mr. Wilber to Mr. Chernin to
23 Mr. Glidewell and ultimately whether he turned himself in
24 or not, the only -- the only point is unless Mr. Wilber
25 testifies and wants to put some spin on it or whatever or

1 whatever he wants to say about it. The point of his being
2 arrested on the 20th is all I'm trying to establish. The
3 fact that he was arrested, you know, out on the street or
4 whatever isn't my point.

5 THE COURT: It does go to -- that's the
6 point I'm trying to make with you, Mr. Chernin, that's --
7 I mean, the same argument you are making as Mr. Griffin
8 has correctly pointed out about having the defendant do
9 some demonstration, that clearly -- if it goes to state of
10 mind, I -- if you are going to say that him pointing at a
11 board goes to state of mind, clearly his -- and it's
12 testimonial nature therefore, clearly his communicating to
13 you that he's going to -- or to the detective through you
14 that he's going to turn himself in, that is a state of
15 mind issue and that is testimonial in nature. Now -- and
16 that's why I asked you, how is that going to come in. You
17 said, well, clearly it can come in through a detective,
18 through law enforcement. Not for the purposes by which
19 you want to argue it, which is you want to then be able to
20 say to the jury see -- in your closings, consciousness of
21 innocence, he was going to turn himself in.

22 MR. CHERNIN: Are you saying --

23 THE COURT: That is testimonial in nature.

24 MR. CHERNIN: Are you saying it's not
25 relevant either?

1 THE COURT: No, I'm talking about -- why is
2 it -- you know, how is that not testimonial. All right.
3 That's why I've asked you who are you going to get that in
4 through. You can't get state of mind in through the
5 detective. Which leads me to the last issue that I've,
6 you know, got to cover with you which is at some point you
7 are going to I assume make a decision with -- in
8 conjunction with Mr. --

9 MR. CHERNIN: Right.

10 THE COURT: -- Wilber about whether or not
11 he is going to take his -- exercise his fifth amendment
12 right and I'm going to need to know through colloquy with
13 you whether or not you talked to him about his Sixth
14 Amendment right to testify and his Fifth Amendment right
15 to be free from self-incrimination, that that's been
16 explained to him, that he understands those constitutional
17 rights, that no one has pressured him or promised him
18 anything to waive or to exercise them in any regard, that
19 has to be done with him outside the presence of the jury.

20 MR. CHERNIN: I'm well aware of that and we
21 have not yet made that determination.

22 THE COURT: Have we made a determination as
23 to whether or not the defendant if he does take the
24 witness stand has a prior criminal record?

25 MR. CHERNIN: Yes.

1 THE COURT: And what his convictions are?

2 MR. CHERNIN: Yes.

3 THE COURT: I have yet to hear a
4 stipulation on convictions, gentlemen.

5 MR. GRIFFIN: I gave the record to
6 Mr. Chernin. I counted them up and circled them. I want
7 to say it's something along the line of five adjudications
8 and four criminal convictions, but I don't -- I gave it to
9 him a day or two ago and I don't recall specifically.

10 MR. CHERNIN: And I -- right now I -- I
11 don't know what -- I think that is the right number. I
12 think that is the right number.

13 THE COURT: Have you talked to Mr. Wilber
14 about that? So that if I ask him that on the record, did
15 you talk to your client, did you talk to your lawyer about
16 this, are you in agreement with this or disagreement.

17 MR. CHERNIN: Yes, I will talk to him about
18 that at the time we decide whether or not he wants to
19 testify.

20 THE COURT: But that's an issue that needs
21 to be -- those are the things that I'm hoping or had hoped
22 that would be cleared up ahead of time so we are not
23 running into 5 o'clock on Friday afternoon debating that
24 issue.

25 MR. CHERNIN: Well, we certainly will know

1 that, Your Honor. I would -- does this Court anticipate
2 that we are going to finish the State's case tomorrow?

3 THE COURT: No, we are not going to finish
4 anything tomorrow. We will be lucky if we get through
5 three or four witnesses the way we are going. Quite
6 honestly this trial my expectation now is to advise the
7 jury quite honestly this is going into Wednesday of next
8 week. I've got a judge, a colleague, who is expecting
9 Mr. Griffin to try a homicide case in another court on
10 Monday. There are people who are expecting you gentlemen
11 in other places on Monday and you are going to have to
12 tell them you are now -- as I am having to tell certain
13 individuals who are expecting to try cases in my court on
14 Monday, that all bets are off, that we are going into in
15 all likelihood not only Monday, but a good portion of
16 Tuesday.

17 MR. CHERNIN: And, Your Honor, I think
18 another -- in that regard -- and we will certainly let you
19 know by Monday what Mr. Wilber intends to do. That will
20 give him some time to deal with that issue. The other
21 thing is that on the 22nd I believe one of the jurors has
22 a flight arranged to L.A.

23 THE COURT: No, that's a different one.

24 MR. CHERNIN: Okay.

25 THE COURT: Different juror who did not

1 make the panel. Go back and check your notes.

2 MR. CHERNIN: I didn't. I will.

3 THE COURT: All right. That's it, folks.

4 We will see you here at 8:30 tomorrow morning.

5 (Whereupon, the proceeding concluded.)

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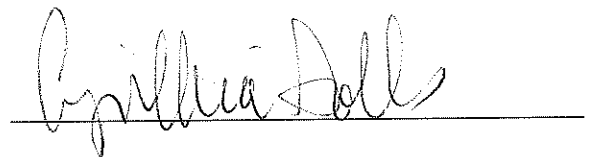
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1 STATE OF WISCONSIN)
2) SS.
3 COUNTY OF MILWAUKEE)
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8 I, Cynthia A. Dobbs, certify that I am the
9 official court reporter assigned to report the proceedings
10 herein for the Circuit Court; that the foregoing pages,
11 numbered 3 through 180 inclusive, have been carefully
12 compared by me with my stenographic notes; that the same
13 is a true and correct transcript of all such proceedings
14 taken on the 17th day of February, 2005.

15 Dated this 17th day of October, 2005.
16
17
18

19
20 

21 Cynthia A. Dobbs
22 Certified Shorthand Reporter
23
24
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